



## Santa Clara Law Santa Clara Law Digital Commons

---

Faculty Publications

Faculty Scholarship

---

2-13-2012

# Crimes, Widgets, and Plea Bargaining: An Analysis of Charge Content, Pleas, and Trials

Kyle Graham

*Santa Clara University School of Law*, [kgraham@scu.edu](mailto:kgraham@scu.edu)

Follow this and additional works at: <http://digitalcommons.law.scu.edu/facpubs>

---

### Automated Citation

Kyle Graham, *Crimes, Widgets, and Plea Bargaining: An Analysis of Charge Content, Pleas, and Trials* (2012),  
Available at: <http://digitalcommons.law.scu.edu/facpubs/191>

This Article is brought to you for free and open access by the Faculty Scholarship at Santa Clara Law Digital Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact [sculawlibrarian@gmail.com](mailto:sculawlibrarian@gmail.com).

# CRIMES, WIDGETS, AND PLEA BARGAINING: AN ANALYSIS OF CHARGE CONTENT, PLEAS, AND TRIALS

By Kyle Graham\*

*This article considers how the composition and gravamen of a charged crime can affect the parties' willingness and ability to engage in plea bargaining. Most of the prevailing descriptions of plea bargaining ignore or discount the importance of charge content in plea negotiations; in fact, one leading commentator has likened crimes to widgets insofar as plea bargaining is concerned. In developing its counter-thesis, this article reviews seven years (FY2003–FY2009) of federal conviction data, focusing on those crimes that produce the most, and fewest, trials, relative to how often they are alleged; the most, and fewest, acquittals at trial; and the most, and fewest, plea bargains that involve a substantial alteration in charges. Overall, the data demonstrate that the character of, and circumstances that surround, a particular offense can catalyze or frustrate plea bargaining. Similar information to that utilized in and gleaned from this study, it is also argued, can and should be considered in connection with the adoption of new crimes and the re-evaluation of existing offenses. This information would provide legislatures with insight into how a proposed crime is likely to be utilized, and how current crimes are being used.*

---

\* Assistant Professor, Santa Clara University School of Law. The author would like to thank David Ball, Eric Goldman, Pratheepan Gulasekaram, Brad Joondeph and Ellen Kreitzberg for their helpful comments.

## TABLE OF CONTENTS

INTRODUCTION .....	2
I. THE MARKET MODEL OF PLEA BARGAINING.....	8
II. CRIME CHARACTERISTICS AND PLEA BARGAINING .....	13
A. Incomplete or Imperfect Information .....	14
1. <i>Ease or Difficulty of Proof</i> .....	14
2. <i>Case Volumes</i> .....	19
B. Trial Costs and Value.....	20
C. Limited and Expansive Options.....	23
III. FEDERAL DATA ON PLEA BARGAINING AND TRIALS .....	26
A. Basic Information.....	28
B. Plea Bargaining .....	29
C. Trials.....	34
D. Trial Outcomes.....	37
IV. CASE STUDIES.....	42
A. 18 U.S.C. § 242 (Deprivation of Civil Rights Under Color of Law).....	43
B. 8 U.S.C. § 1326 (Re-entry of a Deported Alien).....	46
C. 18 U.S.C. § 924(j) (Use of a Firearm in the Commission of a Federal Felony, Resulting in Death) .....	48
D. 21 U.S.C. § 952 (Importation of Marijuana).....	51
E. 26 U.S.C § 7201 (Tax Evasion).....	54
V. CONCLUSION .....	56

## INTRODUCTION

More so than most crimes, felony tax evasion (26 U.S.C. § 7201<sup>1</sup>) tends to produce convictions when taken to trial. According to data compiled by the

---

<sup>1</sup> “Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$100,000 (\$500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.” 26 U.S.C. § 7201 (2006).

Administrative Office of the United States Courts (AOUSC),<sup>2</sup> less than 14 percent of all tried counts that allege this crime result in not-guilty verdicts.<sup>3</sup> This figure is significantly lower than the “normal” acquittal rate at trial across federal crimes.<sup>4</sup> One would expect, then, that defendants charged with this offense would agree to pretrial guilty pleas relatively often, with the hope that they would then receive credit at sentencing for their early acceptance of responsibility.<sup>5</sup> In fact, the contrary is true—this charge is approximately three times *more* likely to be taken to trial than the “average” crime is.<sup>6</sup>

---

<sup>2</sup> The data referenced in the text above derive from a series of datasets that each contain information regarding federal criminal cases that terminated in a given fiscal year (October 1 to September 30), which the author has compiled into a single database (hereinafter referred to as the “AOUSC Database,” and which remains in the possession of the author). The datasets comprising this database are as follows: United States Department of Justice, Bureau of Justice Statistics, Federal Justice Statistics Program: Defendants in Federal Criminal Cases in District Court—Terminated, 2003 [ICPSR 24153]; United States Department of Justice, Bureau of Justice Statistics, Federal Justice Statistics Program: Defendants in Federal Criminal Cases in District Court—Terminated, 2004 [ICPSR 24170]; United States Department of Justice, Bureau of Justice Statistics, Federal Justice Statistics Program: Defendants in Federal Criminal Cases in District Court—Terminated, 2005 [ICPSR 24187]; United States Department of Justice, Bureau of Justice Statistics, Federal Justice Statistics Program: Defendants in Federal Criminal Cases in District Court—Terminated, 2006 [ICPSR 24205]; United States Department of Justice, Bureau of Justice Statistics, Federal Justice Statistics Program: Defendants in Federal Criminal Cases in District Court—Terminated, 2007 [ICPSR 24222]; United States Department of Justice, Bureau of Justice Statistics, Federal Justice Statistics Program: Defendants in Federal Criminal Cases in District Court—Terminated, 2008 [ICPSR 29242]; and United States Department of Justice, Bureau of Justice Statistics, Federal Justice Statistics Program: Defendants in Federal Criminal Cases in District Court—Terminated, 2009 [ICPSR 30784]).

<sup>3</sup> AOUSC Database, *supra* note 2.

<sup>4</sup> The overall acquittal rate, on a count-by-count basis, is approximately 21 percent. *See* text accompanying notes 140–143, *infra*.

<sup>5</sup> Pursuant to the Federal Sentencing Guidelines, a federal criminal defendant who “clearly demonstrates acceptance of responsibility for his offense” is eligible for a two-level sentence reduction. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2011). Furthermore, if a defendant qualifies for this reduction, the base offense level associated with the offense is 16 or greater, and the government files a motion “stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently,” the base offense level will be decreased by one additional level. *Id.* “[T]he timeliness of the defendant’s conduct in manifesting the acceptance of responsibility” is among the factors considered in determining whether a defendant has clearly accepted this responsibility. *Id.* at cmt. n.1(H). A large percentage of defendants who enter guilty pleas receive the benefit of this reduction. BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 2010, tbl. 18 (2011), *available at* [http://www.ussc.gov/Data\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2010/Table18.pdf](http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/Table18.pdf) (reflecting that 94.9 percent of all defendants with reported conviction dispositions in fiscal year 2010 received the benefit of the two- or three-level acceptance of responsibility reduction); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 131 (2005) (discussing comparable figures from earlier in the 2000s).

<sup>6</sup> *See* text accompanying note 268, *infra*.

At the other extreme, deprivation of civil rights under the color of law (18 U.S.C. § 242<sup>7</sup>) may be the most difficult crime for federal prosecutors to prove at trial. Per AOUSC data, juries return not-guilty verdicts upon about half of all tried counts that allege this offense.<sup>8</sup> Does this high acquittal rate lead to a relatively high number of trials? Or does it facilitate guilty pleas, with defendants' eagerness to place these matters before juries being more than offset by prosecutorial willingness to cut a deal?<sup>9</sup> Existing scholarship, which rarely considers how courtroom actors deploy and respond to specific crimes, does not answer these questions. As it turns out, 18 U.S.C. § 242 is one of the most commonly tried crimes, relative to the number of cases in which it is alleged.<sup>10</sup>

The plea bargaining and trial practice that surrounds crimes such as tax evasion and deprivation of civil rights suggest that an important consideration has been overlooked in the ongoing conversation over why and how parties engage in plea bargaining. To date, explanations of the plea-bargaining process have focused upon (1) the thought processes and priorities of the relevant actors;<sup>11</sup> (2) institutional rules, policies and practices that constrain or encourage plea

---

<sup>7</sup> This statute provides as follows:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

18 U.S.C. § 242 (2006).

<sup>8</sup> See text accompanying note 186, *infra*.

<sup>9</sup> See Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 59–61 (1968) (asserting that prosecutors have stronger incentives to engage in plea bargaining when their cases are relatively weak); Richard Birke, *Reconciling Loss Aversion and Plea Bargaining*, 1999 UTAH L. REV. 205, 220 (1999) (“A prosecutor who cared to produce a plea would have to reduce charges significantly if the prosecutor had a weak evidentiary case.”); Dean J. Champion, *Private Counsels and Public Defenders: A Look at Weak Cases, Prior Records, and Leniency in Plea Bargaining*, 17 J. CRIM. JUST. 253, 257 (1989). *But cf.* HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 30–31 (surmising that the strongest cases are the most likely to produce guilty pleas).

<sup>10</sup> See text accompanying note 172, *infra*.

<sup>11</sup> Ronald Wright has described this approach as being concerned with the “micro-level intentions” of the parties. Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PENN. L. REV. 79, 92 (2005).

bargaining; or (3) the organization and structure of the criminal codes that provide the backdrops for these bargains. The first approach either treats defendants, their attorneys, and prosecutors as bargaining “in the shadow of trial,”<sup>12</sup> or considers how the circumstances of, and pressures upon, these actors may lead to bargains that do not reflect likely trial outcomes.<sup>13</sup> The second addresses matters such as the discretion that judges are allowed to exercise at sentencing,<sup>14</sup> the pressure to negotiate that may be associated with high case volumes,<sup>15</sup> the policies that particular prosecutorial authorities adopt with regard to plea bargaining,<sup>16</sup> and informal courtroom customs.<sup>17</sup> The third concentrates upon the presence of overlapping offenses within a criminal code, which may give a prosecutor more tools with which to coerce plea bargains,<sup>18</sup> and the “space,” in terms of the probable sentencing consequences, that exists between related crimes within a code, which may affect the likelihood of a plea bargain to a given charge.<sup>19</sup>

None of these approaches focuses upon the quiddities of particular crimes, and the effect that these idiosyncrasies may have on the plea-bargaining process.<sup>20</sup>

---

<sup>12</sup> This phrase originated in Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

<sup>13</sup> E.g., Albert W. Alschuler, *The Defense Attorney’s Role in Plea Bargaining*, 84 YALE L.J. 1179, 1203–06, 1313 (1975) (discussing the incentives that may lead defense attorneys to recommend guilty pleas that are not in their clients’ interests); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004).

<sup>14</sup> E.g., GEORGE FISHER, PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 221–27 (2003) (discussing the effects that the Federal Sentencing Guidelines have had on plea bargaining).

<sup>15</sup> E.g., Milton Heumann, *A Note on Plea Bargaining and Case Pressure*, 9 LAW & SOC’Y REV. 515, 516 (1975) (“Much of the informed thought and literature on plea bargaining assumes (or at least conveys the impression) that plea bargaining can be best (though not necessarily exclusively) understood as a function of case pressure.”); Peter F. Nardulli, *The Caseload Controversy and the Study of Criminal Courts*, 70 J. CRIM. L. & CRIMINOLOGY 89, 89–90 (1979) (discussing the perception that the pressures associated with large caseloads account for plea bargaining); William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 HARV. L. REV. 2548, 2554–56 (2004) (discussing the importance of docket pressure in giving prosecutors an incentive to plea bargain).

<sup>16</sup> E.g., Ronald F. Wright & Marc L. Miller, *The Screening / Bargaining Tradeoff*, 55 STAN. L. REV. 29 (2002).

<sup>17</sup> E.g., JAMES EISENSTEIN & HERBERT JACOB, FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS 246–52 (1977) (discussing how stable courtroom workgroups facilitate plea bargaining); Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and its Dynamics in the Post-Mistretta Period*, 91 NW. U. L. REV. 1284, 1294–96 (1997).

<sup>18</sup> E.g., William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 529–33 (2001).

<sup>19</sup> E.g., Ronald F. Wright & Rodney L. Engen, *Charge Movement and Theories of Prosecutors*, 91 MARQ. L. REV. 9 (2007); Ronald F. Wright & Rodney L. Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power*, 84 N.C. L. REV. 1935, 1940 (2006).

<sup>20</sup> As far back as 1927, one of the first academics to focus upon plea bargaining wrote that existing surveys “have not always given us sufficient detail as to the types of cases in which compromises have been most frequent.” Justin Miller, *The Compromise of Criminal Cases*, 1 S.

This gap, though significant, is also understandable. There may be several hundred<sup>21</sup> or even thousands<sup>22</sup> of crimes in a single jurisdiction's criminal code, and charging, plea-bargaining, and trial data for specific offenses can be difficult to obtain and exploit.<sup>23</sup> Difficult, but not impossible. The federal government, for example, collects charge-level data for all criminal cases filed and terminated in United States District Court. The amount of data involved is massive—the most recent seven years of released information (which concern cases terminated in federal district courts between October 2002 and September 2009) relates the disposition of more than 1.2 million criminal counts—but, when harnessed, it provides significant insight into the decision to engage in plea bargaining, or to take a case to trial.

Above all else, review of this data reveals that substance matters. The content of a charged offense—meaning its essential elements, the proof required to establish the offense, and the basic gravamen of the crime—can make a considerable difference in the frequency and composition of plea bargains. Crimes vary in several respects material to plea bargaining, including, but not limited to, the ease or difficulty associated with proving a charge at trial; the volume of prosecutions for the offense; and whether the defense or prosecution is likely to ascribe significant value to taking the charge to trial. The relationships between these variables and the plea-bargaining practices that surround a particular crime can be difficult to discern. This effort, however, ultimately leads to a more accurate, if more complicated, understanding of plea-bargaining practices than that produced by existing scholarship.

This finding presents a number of complications to the conventional, rational-actor model of the plea bargaining process, which perceives plea bargaining as a sort of market transaction. This model treats crimes with comparable sentencing consequences as essentially fungible. Bringing the point home, the jurist most closely associated with the market model, Judge Frank Easterbrook, has analogized crimes to widgets.<sup>24</sup> The actual utilization of offenses such as 26 U.S.C. § 7201 and 18 U.S.C. § 242 establishes that, with apologies to

---

CAL. L. REV. 1, 12 (1927). Miller's article did go on to relate certain classes of crimes in which plea bargaining was most frequent, however. *See id.* at 12–16 (identifying desertion, violations of the liquor laws, automobile theft, seduction and statutory rape as among the crimes most likely to be “compromised”).

<sup>21</sup> Stuntz, *The Pathological Politics of Criminal Law*, *supra* note 18, at 514 (counting the number of crimes recognized within Illinois, Virginia, and Massachusetts state law).

<sup>22</sup> *See* JOHN BAKER, REVISITING THE EXPLOSIVE GROWTH OF FEDERAL CRIMES 1 (2008) (estimating that there exist 4,450 federal crimes, as of 2007).

<sup>23</sup> *See* Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision not to Prosecute*, 110 COLUM. L. REV. 1655, 1715 (2010) (discussing the difficulties associated with locating data on misdemeanor case processing).

<sup>24</sup> Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 308 (1983).

Judge Easterbrook, crimes are *not* widgets. Rather, the composition and gravamen of a crime—not just the likely sentence that will adhere in a particular case—have a significant bearing on plea bargaining, such that two crimes that involve roughly similar custodial terms may produce quite different pleading practices and trial rates.

To say that the characteristics of individual crimes may affect the plea-bargaining process does not deny, but instead complements, other critical analyses of the rational-actor model of plea bargaining. The substance of a particular offense can exacerbate a defendant's or prosecutor's generic inability to perceive a case in the manner predicted by the market model, or combine with code structure to facilitate or frustrate plea bargaining. In other words, charge substance affects not only the contours of the "shadow of trial," but also the ability of the parties to perceive these likely outcomes *and* the extent to which this information will cause them to choose plea bargains over trials. Ultimately, this article builds a case against generalizations as to how plea bargaining applies to all crimes, or across broad categories of crimes. To be accurate, descriptions of plea-bargaining practices also must be quite specific. One must closely consider the precise content and meaning of a charged offense, together with other material influences, to obtain an accurate picture of the plea bargaining that surrounds *that* crime.

To this point, the discussion has been mostly descriptive; yet this article also contains a normative component. I argue that it is not only interesting, but important, to consider how charge substance affects plea bargaining and trial rates and outcomes. While bargaining practices are highly crime-specific, they are not entirely incapable of prediction. If one can anticipate how the parties in as-yet-unfiled criminal cases will utilize a crime that is under legislative consideration, this knowledge may lead to a more thoughtful and well-developed assessment of the proposed offense's value. For instance, if one can foresee that a new crime will lead to a high number of trials, relative to how often it will be charged, the costs of those trials can and should be incorporated into the legislature's decision whether to enact the crime. Similarly, if a proposed crime resembles existing offenses that are very frequently plea-bargained down to lesser crimes, this fact also should become part of the legislative calculus. The data exist that would allow us to initiate these conversations; it is time for them to occur.

The discussion below proceeds as follows. Part I provides a summary of prevailing explanations regarding why, and how, parties and their agents engage in plea bargaining. Part II then considers the various ways in which the content of specific crimes may catalyze or chill plea bargaining. Next, Part III examines seven years of data, which reflect the disposition of all criminal cases terminated in federal district courts between October 2002 and September 2009. The charge-



level data from these cases reveal substantial variation in trial and plea-bargaining rates across crimes. To shed light on these differences, Part IV more closely considers the plea-bargaining and trial data for a few specific crimes, such as 26 U.S.C. § 7201 and 18 U.S.C. § 242. Finally, Part V offers some concluding thoughts about how the consideration of crime-specific data may improve the evaluation of proposed and existing crimes.

## I. THE MARKET MODEL OF PLEA BARGAINING

Over the past quarter-century, much of the debate over plea bargaining has revolved around whether, and to what extent, the plea-bargaining process can be explained and justified by analogizing it to an everyday market transaction.

Today, the market analogy is most closely associated with Judge Frank Easterbrook.<sup>25</sup> In his 1983 article *Criminal Procedure as a Market System*, Easterbrook argued that plea bargaining, together with other accoutrements of criminal procedure, could “be understood as elements of a well-functioning market system” that “set the ‘price’ of crime”<sup>26</sup> and thereby tend to “get the maximum deterrent punch out of whatever resources are committed to crime control.”<sup>27</sup>

Per this view, plea bargaining tends to produce agreements that reflect likely trial outcomes. Describing plea negotiations, Easterbrook asserted that a “prosecutor will have a minimum settlement demand determined by the penalty the prosecutor thinks he may obtain after trial and the cost of holding the trial (less the cost of settling). [¶] As the sentence on conviction and the probability of conviction rise, so does the prosecutor’s minimum demand.”<sup>28</sup> A defendant, meanwhile, comes to plea negotiations with her own settlement offer, dictated by “the sentence she expects to receive if convicted,” adjusted for the likelihood of conviction,<sup>29</sup> together with the cost savings associated with settlement (as opposed to taking the case to trial).<sup>30</sup> These offers, both framed with likely trial outcomes in mind, will yield a deal “if the defendant’s maximum offer equals or

---

<sup>25</sup> Easterbrook was not the first commentator to analogize plea bargaining to a market transaction, *see, e.g.*, Richard P. Adelstein, *The Negotiated Guilty Plea: A Framework for Analysis*, 53 N.Y.U. L. REV. 783, 809 (1978); Richard Uviller, *Pleading Guilty: A Critique of Four Models*, 41 LAW & CONTEMP. PROB. 102, 102–03 (1977), but he expanded upon existing analysis.

<sup>26</sup> Easterbrook, *supra* note 24, at 289.

<sup>27</sup> *Id.* at 290.

<sup>28</sup> *Id.* at 297.

<sup>29</sup> *Id.* at 311–16. *See also* Adelstein, *supra* note 25, at 809 (observing that a “defendant will agree to a guilty plea if he perceives the cost of the sentence received upon the plea as less than the expected disutility of the trial prospect and its associated sentence.”).

<sup>30</sup> *Id.* at 297.

exceeds the prosecutor's minimum demand."<sup>31</sup> To Easterbrook, these interactions, repeated across cases, fulfill a "price-establishing function at low cost,"<sup>32</sup> and are therefore "desirable, not just defensible, if the system attempts to maximize deterrence from a given commitment of resources."<sup>33</sup>

This view of plea bargaining as a market in which the parties negotiate "in the shadow of trial" has cast a long shadow of its own.<sup>34</sup> Contemporary conversations about plea bargaining tend to either assume the basic truth of the market model, or espy flaws in it.<sup>35</sup> In this latter vein, Easterbrook observed that his analysis proceeded on the assumption that defendants and prosecutors acted as rational maximizers of their respective "satisfactions."<sup>36</sup> Much of the modern debate over plea bargaining has considered what these "satisfactions" are,<sup>37</sup> and whether the relevant actors are fully capable of appreciating and acting upon them.<sup>38</sup>

Some of the most important literature in this genre has focused on the inability of parties to behave in the manner predicted by the market model. In the opinions of some commentators, information shortfalls, along with cognitive biases and other "psychological pitfalls," may skew the plea-negotiation process so as to place the bargained-for outcomes outside the shadow of likely trial outcomes.<sup>39</sup> Stephanos Bibas, in particular, has detailed how information deficits and asymmetries,<sup>40</sup> overconfidence,<sup>41</sup> psychological blocks and denial

---

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 309.

<sup>33</sup> *Id.*

<sup>34</sup> See Bibas, *supra* note 13, at 2464–65 (observing that the "shadow-of-trial model . . . looms large in recent plea-bargaining literature."); Russell Covey, *Signaling and Plea Bargaining's Innocence Problem*, 66 WASH & LEE L. REV. 73, 77 (2009) ("Trial shadow theory provides the dominant account of plea bargaining."); Harold W. Elder, *Trials and Settlements in the Criminal Courts: An Empirical Analysis of Dispositions and Sentencing*, 18 J. LEGAL STUD. 191, 199 (1989).

<sup>35</sup> The many articles that start from a premise of a plea bargain "market" include Russell Covey, *Longitudinal Guilt: Repeat Offenders, Plea Bargaining, and the Variable Standard of Proof*, 63 FLA. L. REV. 431, 436 (2011) ("Although criminal defendants-like shoppers-do not always get the best bargain possible, plea bargaining-like shopping-can best be understood by looking to the market that sets the relevant prices of the sought-for goods.")

<sup>36</sup> Easterbrook, *supra* note 24, at 291.

<sup>37</sup> Jeffrey Standen, *An Economic Perspective on Federal Criminal Law Reform*, 2 BUFF. CRIM. L. REV. 249, 261–67 (1998) (discussing the motives of the "entrepreneurial prosecutor").

<sup>38</sup> These subjects of study are not altogether novel. Decades ago, Albert Alschuler probed the motives of prosecutors and defense attorneys who brokered plea deals. See Alschuler, *The Defense Attorney's Role in Plea Bargaining*, *supra* note 13, at 1203–06, 1313 (1975) (discussing the incentives that may lead defense attorneys to recommend guilty pleas that are not in their clients' interests); Alschuler, *The Prosecutor's Role in Plea Bargaining*, *supra* note 9. Studies of plea-bargaining practices in particular jurisdictions dating back to the 1920s likewise have regarded the priorities of prosecutors, defense attorneys, and defendants as important determinant of plea deals. *E.g.*, Miller, *supra* note 20, at 13–17.

<sup>39</sup> Bibas, *supra* note 13, at 2496–2527.

<sup>40</sup> *Id.* at 2493–96.

mechanisms,<sup>42</sup> the steep discounting of future incarceration by defendants,<sup>43</sup> risk aversion,<sup>44</sup> and framing<sup>45</sup> and anchoring effects<sup>46</sup> may produce plea bargains that do not reflect probable trial results, adjusted for the likelihood of conviction.<sup>47</sup>

Another line of inquiry focuses less on the motives of particular actors in the plea-bargaining process than on how institutional environments affect parties' behavior.<sup>48</sup> These analyses ascribe significant effects to matters such as local policies regarding the appointment and payment of counsel,<sup>49</sup> the government's status as a monopsonist, being the sole producer and distributor of criminal charges;<sup>50</sup> mandatory sentencing provisions;<sup>51</sup> the relevant prosecutorial authority's stated policies<sup>52</sup> and informal customs<sup>53</sup> regarding charging and bargaining; the inculcation of courtroom norms in new prosecutors and defense

---

<sup>41</sup> *Id.* at 2498–2502. *See also* Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652, 664 (1981) (“defendants have refused to plead guilty because of an unrealistic optimism concerning the chances of beating the state’s case”).

<sup>42</sup> Bibas, *supra* note 13, at 2502–04.

<sup>43</sup> *Id.* at 2504–07.

<sup>44</sup> *Id.* at 2507–12.

<sup>45</sup> *Id.* at 2512–15.

<sup>46</sup> *Id.* at 2515–19.

<sup>47</sup> Others works that mine the same vein include Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183, 192–203 (2007); and Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992).

<sup>48</sup> For an overview of some of these inquiries into “structural” determinants of plea bargaining, *see* Kay L. Levine, *The Intimacy Discount: Prosecutorial Discretion, Privacy, and Equality in the Statutory Rape Caseload*, 55 EMORY L.J. 692, 698–99 (2006).

<sup>49</sup> Bibas, *supra* note 13, at 2476–82; Stephen Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1987–91 (1992).

<sup>50</sup> *E.g.*, Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL. L. REV. 1471 (1993). According to Standen, as agents of a monopsonist, prosecutors can “obtain exchanges of pleas at subcompetitive prices” and “have an incentive to discriminate against particular defendants or subgroups of defendants by attempting to settle like cases differently depending on defendants’ personal characteristics unrelated to culpability.” *Id.* at 1473.

<sup>51</sup> *E.g.*, FISHER, *supra* note 14, at 221–27; Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, 50 CRIM. L. Q. 1, 18 (2005) (“Prosecutorial dominance over plea bargaining became even more pronounced in the past three decades in the United States with the introduction of mandatory sentencing.”).

<sup>52</sup> *E.g.*, Leonard R. Mellon, Joan E. Jacoby & Marion A. Brewer, *The Prosecutor Constrained by His Environment: A New Look at Discretionary Justice in the United States*, 72 J. CRIM. L. & CRIMINOLOGY 52, 53 (1981) (summarizing findings of a study of ten large prosecutors’ offices, to the effect that “in some cases the external environment imposes substantial limits on a prosecutor’s ability to act” and that prosecutorial policy “significantly affects the so-called ‘discretionary’ decisions made by the prosecutorial offices studied.”); Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501 (1992); Welsh S. White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439, 442 (1971) (discussing the Philadelphia district attorney’s policies toward plea bargaining); Wright & Miller, *supra* note 16 (describing how rigorous pre-filing screening of criminal cases by a local prosecutor’s office may reduce the rate of plea bargains within a jurisdiction).

<sup>53</sup> *E.g.*, LYNN M. MATHER, PLEA BARGAINING OR TRIAL? 84 (1979).

attorneys;<sup>54</sup> and the availability of bail and competent counsel.<sup>55</sup> These critiques do not gainsay the importance of individual actors in the plea-bargaining process. They tend to stress, however, how forces outside of the immediate control of any particular prosecutor, defense attorney, or defendant shape the motives and priorities of these actors, and thereby affect the likelihood of plea bargaining and the range of possible outcomes.

Within this latter sort of analysis lies a subject of study that merits special mention, since it bears relation to the approach and thesis of this article. As Ronald Wright and others have explained,<sup>56</sup> code structure may affect the likelihood of plea bargaining in a variety of ways. For one thing, a criminal code may contain overlapping offenses conducive to “charge stacking.” This practice may facilitate plea bargaining by providing a defendant with a strong incentive to engage in these negotiations (since “stacked” charges threaten increased odds of conviction, and enhanced punishment upon conviction<sup>57</sup>), and offering more “landing points” for potential bargains (through withdrawal of one or more of the “stacked” offenses).<sup>58</sup> Likewise, a criminal code (or sentencing rules applicable to the code) may facilitate plea bargaining by containing relatively “smooth” and “flat” sentencing slopes among related offenses, or chill this practice with dramatic, inflexible sentencing “cliffs”—stark drop-offs in the sentencing consequences attached to lesser offenses that might otherwise represent the basis for plea bargains to more serious crimes.<sup>59</sup> Toward this same general point, I have

---

<sup>54</sup> E.g., MILTON HEUMANN, PLEA BARGAINING: THE EXPERIENCE OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS (1978) (studying the adaptation process through which new prosecutors and defense attorneys are assimilated into plea-bargaining practices); Terance D. Miethe, *Charging and Plea Bargaining Practices Under Determinate Sentencing: An Investigation of the Hydraulic Displacement of Discretion*, 78 J. CRIM. L. & CRIMINOLOGY 155, 157, 174 (1987); Schulhofer & Nagel, *supra* note 17, at 1294–96.

<sup>55</sup> Bibas, *supra* note 13, at 2491–93.

<sup>56</sup> Wright and Engen’s study of portions of the North Carolina criminal code, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power*, *supra* note 19, represents the most thorough assessment of code structure to date, and in its sensitivity to the importance of specific code provisions in determining the likelihood of plea bargaining and the content of these deals, comes the closest to capturing the spirit of this article.

<sup>57</sup> WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 263 (2011); Stuntz, *The Pathological Politics of Criminal Law*, *supra* note 18, at 519–20.

<sup>58</sup> See Russell Covey, *Reconsidering the Relationship Between Cognitive Psychology and Plea Bargaining*, 91 MARQ. L. REV. 213, 229 (2007) (observing that “prosecutors . . . can ‘stack’ charges carrying mandatory minimums in order to threaten or impose dramatic increases in mandatory sentences after a trial conviction.”); Stuntz, *The Pathological Politics of Criminal Law*, *supra* note 18, at 529–33 (2001).

<sup>59</sup> Bibas, *supra* note 13, at 2486–91 (describing how sentencing laws often create “slopes” and “cliffs” between crimes, and the effects that these “slopes” and “cliffs” have on plea-bargaining); Wright & Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power*, *supra* note 19, at 1954–55 (discussing the importance, in plea bargaining, of the sentencing “distance” between the original charge and viable plea-bargaining “landing points” within a code).

discussed elsewhere how codes may incorporate “pleading crimes,” offenses that encourage plea bargains by providing the basis for these deals.<sup>60</sup>

The common problem with these descriptions of plea bargaining is not that they are wrong, but that they tend to be incomplete. The dynamics discussed above are not constant across crimes. The utilization of some crimes may comport neatly with the market model. Other offenses may exacerbate cognitive biases or institutional quirks, and thereby produce a relatively high or low number of plea bargains, or distinctively lenient or severe deals.

As matters stand, no one has comprehensively examined this missing element of the plea-bargaining calculus.<sup>61</sup> This lacuna reflects a deliberate choice more than a mere oversight. Many observers regard the substance of an offense as a relatively insignificant part of the plea-bargaining and sentencing calculus. In the words of one commentator, when it comes to plea bargaining, specific crimes “do not appear to matter very much any more, if they ever did. They have very little to do with what is most important in a system of criminal justice, which is how and how much justice is meted out to those convicted of crimes.”<sup>62</sup>

Other commentators have considered the plea-bargaining practices that surround a specific type of crime, or studied plea bargaining within a particular jurisdiction or jurisdictions.<sup>63</sup> These studies, however, tend to group crimes into generic categories, from the relatively specific (e.g., “rape,” “burglary,” and “theft”<sup>64</sup>) to the more general (“drug crimes,” “violent crimes,” etc.<sup>65</sup>). These labels may cloak significant variation among related offenses.<sup>66</sup> A particular

---

<sup>60</sup> Kyle Graham, *Facilitating Crimes: An Inquiry into the Selective Invocation of Offenses Within the Continuum of Criminal Procedures*, 15 LEWIS & CLARK L. REV. 665, 695–702 (2011) (hereinafter “*Facilitating Crimes*”).

<sup>61</sup> Here again, it merits mention that the work of Ronald Wright and Rodney Engen represents a step in the direction pursued by this article. In their work *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power*, *supra* note 19, Wright and Engen engage in a thoughtful review of how code structure affects the plea-bargaining patterns associated with certain crimes within the North Carolina code.

<sup>62</sup> Standen, *An Economic Perspective on Federal Criminal Law Reform*, *supra* note 37, at 252.

<sup>63</sup> E.g., Bowers, *supra* note 23, at 1711–12; Frank O. Bowman, III & Michael Heise, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level*, 87 IOWA L. REV. 477 (2002); William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 HARV. L. REV. 2548, 2563–64 (2004) (generalizing and juxtaposing the plea-bargaining practices believed to surround “violent crimes” on the one hand and “drug crimes” on the other).

<sup>64</sup> E.g., THOMAS H. COHEN & TRACEY KYCKELHAHN, *FELONY DEFENDANTS IN LARGE URBAN COUNTIES*, 2006 11 (2010) (relating adjudication outcomes for various types of felony defendants).

<sup>65</sup> E.g., Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, *supra* note 63, at 2563–64.

<sup>66</sup> To similar effect, in discussing case outcomes across the federal criminal “code,” the *Sourcebook of Criminal Justice Statistics* groups related crimes into one of approximately 100 generic offense types. BUREAU OF JUSTICE STATISTICS, *SOURCEBOOK OF CRIMINAL JUSTICE*

“violent” crime may lead to a high percentage of plea bargains while another “violent” crime yields relatively few. Furthermore, by lumping specific crimes into generic offense categories, these studies blunt their prescriptive potency. Legislatures create, amend, and abolish individual crimes, not broad crime categories. Likewise, prosecutors charge, and defense attorneys parry, specific crimes that carry specific consequences.<sup>67</sup> To lay a foundation for possible reform, one must delve into the granular provisions of a code, and charge-level behavior by courtroom actors. The discussion below takes up this task.

## II. CRIME CHARACTERISTICS AND PLEA BARGAINING

Crimes differ from one another in their gravamen, in their consequences upon conviction (or, from the prosecutor’s standpoint, upon acquittal), and in many other respects. Only some of these differences have a substantial effect upon a crime’s conduciveness to plea bargaining.

One way to grasp the significance of charge content upon plea bargaining begins with an oversimplified sketch of the rational-actor model of plea bargaining. If one assumes that (1) both sides have perfect information as to the likelihood of acquittal at trial, (2) the custody time that the defendant will receive represents the exclusive concern of both the prosecution and defense (with the prosecution intent upon maximizing this figure, and the defense seeking to minimize it), and (3) infinite plea-bargaining options that allow the parties to agree upon any and all possible custodial terms, very few cases should go to trial. The characteristics of many crimes, however, throw sand into the gears of this model. With some offenses, there may be little available information regarding trial outcomes, taking a case to trial may have significant intrinsic value, and plea-bargaining options may be relatively limited, or unattractive, compared to those that appear with other crimes.<sup>68</sup>

---

STATISTICS ONLINE, tbl. 5.24.2010, <http://www.albany.edu/sourcebook/pdf/t5242010.pdf>. Since each of these categories subsumes several specific crimes, the reported data regarding the sorts of criminal cases that are prosecuted in federal court says very little about the utilization of individual offenses.

<sup>67</sup> Wright & Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power*, *supra* note 19, at 1953 (“Prosecutors and defense attorneys negotiate about guilty pleas for particular crimes, not just generic classes of felonies.”).

<sup>68</sup> The discussion above does not necessarily exhaust the ways in which crimes may vary in a manner relevant to plea bargaining and trial rates and outcomes. For example, though some crimes may cleave relatively evenly across race, wealth, gender, occupation, and other pertinent demographic facts, others do not. *See, e.g.*, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, tbl. 5.39.2010, <http://www.albany.edu/sourcebook/pdf/t5392010.pdf> (relating that African-Americans accounted for 78.5 percent of defendants sentenced for federal crimes involving crack cocaine in fiscal year

## A. Incomplete or Imperfect Information

First, crimes vary in the extent to which parties will possess accurate information regarding trial outcomes. When the parties lack this information, they may be unable to ascertain the contours of the shadow of trial, or disagree as to what the probable outcome at trial will be. Either way, the result will be more trials.<sup>69</sup> As related below, these disagreements are more likely to arise with difficult-to-prove crimes, and crimes that are not alleged with substantial frequency.

### 1. Ease or Difficulty of Proof

Some crimes are easier to prove than others are.<sup>70</sup> All else being equal, the more difficult a crime is to prove, the greater the incentive the prosecution will

---

2010, as compared to only 26.8 percent of defendants sentenced for federal crimes involving powder cocaine, and 7.6 percent of defendants sentenced for federal crimes involving marijuana). These differences can affect plea bargaining and trial outcomes in a variety of ways. As will be discussed, some crimes may implicate defendants as to whom juries are relatively prone to exercise their nullification authority. Less advantageously for the defense, some crimes may implicate classes who suffer from some pre-existing stigma, or as to whom the charge itself stigmatizes notwithstanding the presumption of innocence. Either way, this dynamic may enhance the odds of conviction and strengthen the prosecution's hand in plea bargaining. Meanwhile, some crimes, such as insider-trading offenses, tend to involve well-heeled defendants with significant resources to fight the charges alleged against them, and who may be in a position to negotiate more advantageous pleas. See EISTENSTEIN & JACOB, *supra* note 17, at 234–35 and 241–42 (discussing the perception that affluent defendants are more likely to mount vigorous defenses, and relating data that suggest that defendant characteristics have a modest to moderate effect on case dispositions); Bowers, *supra* note 23, at 1711–12 (describing these issues as they pertain to potential prosecutions for obscenity and white-collar crimes). At the other extreme, some crimes tend to involve defendants who, due to language barriers, a lack of education, or otherwise, may be incapable of robust participation in the strategic planning and assessment their cases. This disability may lead to the abdication of plea-bargaining authority to defense attorneys, who may not always be acting in their principals' best interests. Bibas, *supra* note 13, at 2476.

<sup>69</sup> MATHER, *supra* note 53, at 143 (finding, based on a study of California plea-bargaining practices, that “Disagreement between defense and prosecuting attorney over the basic question of legal guilt was [an] important factor leading to adversary trial.”); Elder, *supra* note 34, at 196 (“One conclusion of economic models of the courts is that the more agreement there is in the estimates by both sides of the likely outcome of a trial, the lower the probability of a trial”) and 199 (concluding, based on a regression analysis, that “[f]actors increasing agreement between defendant and prosecution increase the probability of settlement.”) See also George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 12–17 (1984) (observing that civil cases will tend to settle when the applicable law, and likely result at trial, are clear to the parties).

<sup>70</sup> EISTENSTEIN & JACOB, *supra* note 17, at 235 (“While every offense must be proved ‘beyond a reasonable doubt,’ the statutory provisions of the criminal code require varying kinds of evidence that make some crimes easier to prove than others.”); Stuntz, *The Pathological Politics of Criminal Law*, *supra* note 18, at 550–51 (discussing the relative ease and difficulty associated with proving different crimes). Crimes that have been identified, by one source or another, as particularly difficult to prove at trial include “complex financial cases,” Jean Eaglesham,

have to engage in plea bargaining (as opposed to insisting on a guilty plea to the charged offense),<sup>71</sup> and the less motivation the defense will have to plead guilty to the charged crime, at least without a significant sentence discount.<sup>72</sup> Given these incentives, one might surmise that crimes that are more difficult to prove at trial will tend to produce more plea *bargains*, as opposed to “straight” pleas to the charged offense without any promised reduction in sentence terms. Less obviously, these offenses also may produce a relatively large share of trials, as opposed to pleas, since the uncertainty of the outcome at trial may lead to divergent settlement demands.

As background, it bears re-emphasis that some crimes implicate proof that brooks little dispute, while other offenses tend to involve evidence that is much more conducive to conflicting interpretations. For an example of a crime that implicates straightforward proof, consider 8 U.S.C. § 1326, which criminalizes the re-entry of a deported person into the United States.<sup>73</sup> In a mine-run case, this crime simply requires that the prosecution establish that the defendant alien (1) had been deported from the United States; (2) was later found in the United States; and (3) intended to re-enter the United States.<sup>74</sup> The first element is typically established by an order of deportation; the latter two, by testimony to the effect that the defendant was found in the United States. This evidence tends to permit little debate as to the defendant’s intent, or any other element of the

---

*Financial Crimes Bedevil Prosecutors*, THE WALL STREET JOURNAL, Dec. 6, 2011, at C1 (describing these crimes as “especially hard to prove”); vehicular manslaughter, Vivian Huang, *Few Found Guilty in Car Deaths*, N.Y. DAILY NEWS, Nov. 19, 1995, at Suburban1, and rape, William Mitchell, *We’re Only Fooling Ourselves: A Critical Analysis of the Biases Inherent in the Legal System’s Treatment of Rape Victims*, 18 BUFF. J. GENDER, L., & SOC. POL’Y, 73, 76 (2009–10), just to name a few.

<sup>71</sup> See, e.g., DONALD J. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 55 (1966) (“Confronted with cases involving crimes like adultery or situations where a victim is more disreputable than the defendant, the prosecutor, doubtful of jury reaction, will often reduce the charge to a point where the defendant will plead guilty.”); White, *supra* note 52, at 445 (observing that, in Philadelphia, “likelihood of conviction is generally very important in determining what concessions will be offered to induce a plea. While some trial prosecutors enjoy the challenge of a difficult case, most will offer substantial concessions rather than risk losing a jury trial.”) and 448 (discussing the same pattern, among New York City district attorneys).

<sup>72</sup> See Oren Gazal-Ayal, *Partial Ban on Plea Bargaining*, 27 CARDOZO L. REV. 2295, 2313 (2006) (“A defendant who knows that the probability of acquittal at trial is substantial will only agree to plead guilty in return for an exceedingly lenient bargain. In stronger cases, the prosecutor will not offer exceedingly lenient bargains, knowing that the defendant will settle for much less.”); Mellon, Jacoby & Brewer, *supra* note 52, at 78 (observing that “a disposition by a plea is more likely to occur as the evidentiary strength of the case is reduced”).

<sup>73</sup> With limited exceptions, 8 U.S.C. § 1326 makes it a federal crime for someone who “has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding,” to thereafter enter, attempt to enter, or be at any time found in, the United States. 8 U.S.C. § 1326 (2006).

<sup>74</sup> United States v. Carlos-Colmenares, 253 F.3d 276, 277–78 (7th Cir. 2001).



crime.<sup>75</sup> The prosecution has little incentive, other than avoiding the hassle of trial, to bargain in these cases.<sup>76</sup>

At the other pole, some crimes may be difficult to prove because the evidence commonly relied upon to establish guilt is ambiguous, or subject to impeachment.<sup>77</sup> For example, it is sometimes said that crimes that require fraudulent or specific intent are difficult for prosecutors to establish.<sup>78</sup> Perjury, in particular, is oftentimes described as difficult to prove.<sup>79</sup> But not all variants of perjury are equally situated in this respect. Perjury in connection with one's tax returns may be relatively easy to show, since we assume that most people know roughly how much money they make.<sup>80</sup> *Trial* perjury may be more difficult to establish. This difficulty derives not just from the intent element associated with this crime, but because the circumstances that tend to surround this type of perjury may make it much more difficult to rule out alternative explanations for the false statements at issue, such as simple forgetfulness.

In addition to problems of proof, juries may balk at returning a conviction for a crime if they feel that the law is wrong-headed, or have special sympathy for a defendant.<sup>81</sup> Jury nullification is a longstanding practice: In the 1850s northern

---

<sup>75</sup> Judge Richard Posner has hypothesized the case of a previously deported person involuntarily transported into the United States by a hijacker, *id.* at 278, but this fact pattern seems rather unlikely to occur very often. *But cf.* Testimony of Steven F. Hubachek and Shereen J. Charlick, Supervisory Attorneys of Federal Defenders of San Diego, Inc., before the United States Sentencing Commission Concerning Fast Track or Early Disposition Programs at 5 (Sept. 23, 2003), at [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Public\\_Hearings\\_and\\_Meetings/20030923/hubachek.pdf](http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20030923/hubachek.pdf) (stating that section 1326 cases sometimes involve “difficult legal issues”).

<sup>76</sup> See Wright & Engen, *supra* note 19, at 1967 (speculating that with some easy-to-prove crimes, charge bargaining may be unavailable as an option because defendants “have little value to offer in exchange for a reduced charge”).

<sup>77</sup> It also has been suggested that certain types of crimes tend to be more challenging for prosecutors because they tend to involve affluent defendants capable of hiring capable counsel, or tend to implicate thorny constitutional issues. See Bowers, *supra* note 23, at 1711–12 (describing these concerns as they pertain to potential prosecutions for obscenity and white-collar crimes).

<sup>78</sup> See, e.g., *United States v. Lockhart*, 167 Fed. Appx. 111 at \*1 (11th Cir. 2006) (observing that it can be difficult to prove fraudulent intent); *United States v. Bradfield*, 225 F.3d 660 at \*9 (6th Cir. 2000) (“Specific intent is . . . the most difficult state of mind for a prosecutor to prove”); Lisa M. Fairfax, *Form Over Substance? Officer Certification and the Promise of Enhanced Personal Accountability Under the Sarbanes-Oxley Act*, 55 RUTGERS L. REV. 1, 52–53 (2002) (discussing the difficulties associated with establishing criminal intent in financial fraud cases).

<sup>79</sup> See, e.g., *United States v. Harris*, 67 M.J. 611, 615 (A.F. Ct. Crim. App. 2009) (“perjury is a notoriously difficult charge to prove”); Bob Egelko, *Perjury Always a Tough Charge to Prove in Court*, S.F. CHRONICLE, April 15, 2006, at 1; Ken Armstrong, *Hard to Prove, Perjury Often Goes Unpunished*, CHICAGO TRIBUNE, September 25, 1998, at A1.

<sup>80</sup> See *United States v. Boulterice*, 325 F.3d 75, 80 (1st Cir. 2003) (observing that circumstantial evidence can suffice to establish the “willfulness” intent requirement in a prosecution under 26 U.S.C. § 7203(1), which criminalizes the willful and knowing utterance of material false statements on a tax return).

<sup>81</sup> See Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877, 887–903 (1999) (describing a variety of situations in which juries may exercise their nullification power).

juries refused to return guilty verdicts in cases brought under the Fugitive Slave Act;<sup>82</sup> Prohibition-era juries declined to convict defendants who committed liquor-law violations;<sup>83</sup> and modern juries may be “balking in trials in which a conviction could trigger a ‘three strikes’ or other mandatory sentence, and in ‘assisted suicide,’ drug possession, and firearms cases.”<sup>84</sup> As these examples suggest, the concerns that encourage nullification do not cleave evenly across crimes.<sup>85</sup>

One might think that prosecutors would account for these difficulties in case selection. And to an extent, they do.<sup>86</sup> But there may exist political or other pressures to file certain types of cases even when prosecutors anticipate a relatively high likelihood of acquittal. Or a prosecutor may personally be convinced that the charges are just and well-founded, even if she anticipates that a jury may disagree.<sup>87</sup> Furthermore, prosecutors may be unable to reliably predict how jurors will assess some types of cases. This lack of visibility may be acute with crimes where the outcome often hinges on a jury’s visceral response to the witnesses at trial, which may be difficult for the prosecutor to anticipate. In these cases, a prosecutor may be unable to avoid a high acquittal rate, if he or she is to file any charges at all.

The market model accounts for variation in “provability,” insofar as it acknowledges that the likelihood of conviction at trial will affect the content of a plea bargain.<sup>88</sup> Per the model, as the odds of acquittal increase, so too does the sentencing “discount” that the defendant will demand, and receive.<sup>89</sup> The model says little about any connection between provability and the *frequency* of pretrial pleas, however. Given the assumptions incorporated into the model, difficult-to-

---

<sup>82</sup> *Id.* at 892–93. *See also* Nancy King, *Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom*, 65 U. CHI. L. REV. 433, 461 (1998) (discussing the steps taken to avert nullification).

<sup>83</sup> Marder, *supra* note 81, at 894–95.

<sup>84</sup> King, *supra* note 82, at 433.

<sup>85</sup> Furthermore, there exist some crimes where the jury, though not prone to outright nullification, may be inclined to give the defendant the benefit of every doubt, reasonable or no. *See* KALVEN & ZEISEL, *supra* note 9, at 286–97 (discussing several “unpopular” crimes, as to which juries are relatively prone to acquit).

<sup>86</sup> *See* text accompanying note 224, *infra*.

<sup>87</sup> For such a case, consider the trial, and retrial, of Byron de la Beckwith, accused (and, decades later, convicted) of the murder of civil rights activist Medgar Evers. The prosecutor, William Waller, retried the case even after the first trial resulted in a hung jury. *See Second Beckwith Trial Begins Tomorrow*, DELTA DEMOCRAT (Greenville, MS), April 5, 1964, at 1. Even in the initial trial, “a quick acquittal had been freely predicted,” given the place, time and composition of the jury. *Mistrial Stuns Confident Byron*, THE LEADER-CALL (Laurel, MS), Feb. 8, 1964, at 1. Likewise, federal prosecutors who brought civil-rights charges against public officials back in the 1960s and 1970s had such a dismal conviction rate that they must have foreseen a high likelihood of acquittal in many cases that they filed, and tried. *See* text accompanying note 223, *infra*.

<sup>88</sup> Easterbrook, *supra* note 24, at 313.

<sup>89</sup> *Id.* at 312.

prove crimes should result in just as high a percentage of pleas as easily proved crimes do; only the terms will change.

Of course, these assumptions are never satisfied; that is the key lesson taught by the works of Bibas, Wright, and others. Given realistic conditions, the leading authorities seem to disagree about whether easy or hard cases are more susceptible to pleas, and plea bargaining. In their seminal work *The American Jury*, Harry Kalven, Jr. and Hans Zeisel surmised that the “strongest” cases, from the prosecutor’s perspective, would tend to produce guilty pleas, leaving relatively weak cases for trial.<sup>90</sup> More recently, Bibas has suggested that the opposite may be true, at least in certain types of cases. Prosecutors suffer from loss aversion, too, he observes; this being the case, prosecutors may be more inclined to bargain in weaker cases, leading to more pleas in these matters.<sup>91</sup>

It is possible that *both* views are correct. Here, it is important to distinguish between pleas and plea *bargaining*. In some especially strong cases, the defendant may simply “plead to the sheet,” even without any promises of leniency from the prosecution. This amounts to capitulation, not bargaining, and normally bespeaks a compelling prosecution case. Insofar as true *bargaining* is concerned, Kalven and Zeisel may have identified a consequence of imperfect information. If parties cannot predict likely trial outcomes, as a crime becomes harder to prove it may create more room for disagreement between the parties as to the probable result at trial—leading to fewer plea bargains (since the parties may not agree on the terms of a “fair” bargain), and more trials.

At the same time, Bibas also may have a point. While difficult-to-prove crimes may produce more trials, on average, than their more straightforward counterparts do, as to any *particular* crime this influence may be more than counterbalanced by other factors. Prosecutors may take certain types of challenging but high-profile cases to trial relatively often, to showcase their office’s commitment to pursuing the charged offenses.<sup>92</sup> Likewise, some hard-to-prove crimes may claim particularly attractive “landing points” for plea bargains;<sup>93</sup> or the prosecution and defense may be capable of pinpointing and agreeing upon the relatively high odds of acquittal for some charges. In other words, consideration of a crime’s conduciveness to proof is necessary, but insufficient, to ascertain the likelihood of a plea or trial, and the relative leniency or harshness of likely plea terms.

---

<sup>90</sup> KALVEN & ZEISEL, *supra* note 9, at 30.

<sup>91</sup> Bibas, *supra* note 13, at 2472–73.

<sup>92</sup> See text accompanying notes 105–109, *infra*.

<sup>93</sup> See text accompanying notes 126–129, *infra*.

## 2. Case Volumes

A large body of resolved matters that allege a particular crime may increase the frequency of future plea bargains and narrow the range of outcomes in these cases for two reasons. First, a high volume of cases may produce more robust and readily available information regarding the likelihood of conviction at trial, the “going rate” for a plea bargain, or both. Second, frequent prosecution may lead to the development of specialist practitioners with enhanced case-assessment capabilities.

As to the first of these consequences, it may take time, and many prosecutions, to appreciate how simple or difficult it is to convict a defendant of a particular crime.<sup>94</sup> Practitioners know that it is easy to convict a defendant of a garden-variety 8 U.S.C. § 1326 charge. This knowledge represents the accumulation of many years’ worth of prosecutions. Many other crimes claim no equivalent body of work. While there exist, by one estimate, 4,450 federal crimes,<sup>95</sup> in a given year only around 1,500 offenses are actually alleged in federal prosecutions.<sup>96</sup> Moreover, most of these cases tend to implicate the same handful of charges. In one recent fiscal year (2009), fewer than 20 crimes accounted for more than half of all federal counts filed, and fewer than 300 crimes accounted for 95 percent of all such counts.<sup>97</sup> Many crimes thus have no opportunity to develop a reputation as easy or difficult to prove. With these rarely charged crimes, parties and their attorneys must speculate as to the “shadow of trial,” rather than having past results (or the customary terms of plea deals) upon which to base their bargains. These predictions may vary, leading to more trials and fewer plea bargains.<sup>98</sup>

In a similar spirit, more prosecutions for an offense within a particular jurisdiction may produce enhanced case-assessment skills among prosecutors and defense attorneys. These skills may produce more plea bargains for that crime,

---

<sup>94</sup> A similar dynamic applies to attorneys, as well as crimes; it takes time for a defense attorney or prosecutor to develop a “feel for a case,” so as to know whether to plea-bargain the case, or take it to trial. See HEUMANN, *supra* note 54, at 76, 102–03.

<sup>95</sup> BAKER, *supra* note 22, at 1.

<sup>96</sup> Kyle Graham, *Sandusky’s Law*, CONCURRING OPINIONS (Dec. 5, 2011, 1:38 p.m.), <http://www.concurringopinions.com/archives/2011/12/sandusky%E2%80%99s-law.html> (reviewing data culled from Executive Office of the United States Attorneys charging files). Notwithstanding the juxtaposition of the 4,450 and 1,500 figures above, one must resist the temptation to compare the two figures; counting crimes is a highly subjective task, and different methodologies may lead to quite different totals.

<sup>97</sup> *Id.*

<sup>98</sup> See McCoy, *supra* note 51, at 8 (“Furthermore, with rarely alleged crimes, the viability of various defenses may unclear. A defendant may be reluctant to enter a plea, for fear that doing so will forfeit her ability to raise the defense on appeal.”).

since the attorneys will be better able to ascertain likely trial outcomes.<sup>99</sup> In this respect, there also may exist a more subtle and non-linear effect of case volume upon plea bargaining. A prosecutor who rarely, if ever, charges a particular crime may not appreciate how difficult it will be to prosecute that offense; a defense attorney rarely tasked with the opposite responsibility may find herself equally at a loss. While these uncertainties might cancel each other out, they also may leave the parties susceptible to cognitive biases that tend to deter or skew plea-bargaining.

These dynamics change as the number of cases that involve an offense increase. At a slightly higher volume of cases, prosecutorial capabilities may tend to exceed defense skills, since these cases will be spread out among defense attorneys and concentrated within a single prosecuting entity (which may assign a particular prosecutor, or group of prosecutors to specialize in these cases). This imbalance may lead to plea bargains with terms more favorable to the prosecution than in cases that allege either “low-volume” crimes or “high-volume” crimes. As to the latter, when a crime is charged often enough, a specialized defense bar may develop (or generalist defense attorneys may cultivate sufficient skill) to effectively counter the prosecution, leading to more defense-friendly bargains.

## B. Trial Costs and Value

Another dimension along which crimes vary in a manner material to plea bargaining concerns the relative costs and value of trial, as it pertains to a particular offense. Just as low case volumes and high acquittal rates may cause parties to disagree as to likely trial outcomes, in some cases, trial may be the only way for a party to stand on principle (from the defense’s perspective), or to reap the sentencing or publicity benefits believed to accrue only from trial (from the prosecution’s point of view). At the same time, the trial of different crimes will impose different costs on the parties. As these costs increase, so too will their interest in resolving the case by way of a plea that will allow them to avoid these losses.

First, crimes vary in how costly they are to defend. A defendant may choose to enter a plea to a crime simply to avoid the costs of trial, even when the plea carries almost the same punishment as a conviction following trial would.<sup>100</sup> These out-of-pocket cost considerations may predominate in cases that threaten relatively little punishment. Depending upon a defendant’s circumstances, many

---

<sup>99</sup> See HEUMANN, *supra* note 54, at 76, 102–03 (discussing the development of a “going rate”); Easterbrook, *supra* note 24, at 310 (“The specialized bar or office also is able to obtain and use, at low cost, information about ‘the going rate’ for particular offenses.”).

<sup>100</sup> See Albert W. Alschuler, *Implementing the Criminal Defendant’s Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 952–55 (1983); Bowers, *supra* note 23, at 1708–09.

may think it better simply to plead guilty to a misdemeanor offense than to incur these “guaranteed” costs of trial, which will be expended regardless of whether the defendant is convicted or acquitted.

Also, especially with some particularly stigmatic misdemeanors, defendants may prefer relatively quiet pretrial pleas to the exposure of a public trial. “Morals” crimes such as solicitation of a prostitute, public intoxication, or indecent exposure fall within this sphere of crimes as to which the “costs” of trial, capable of avoidance through a pretrial plea, often involve more than merely financial expenditures.<sup>101</sup> At the other extreme, some defendants may assign substantial positive value to taking their cases to trial. A trial may be the only way that a defendant can gain a public hearing on his asserted defense, or showcase what he believes is an unjust law, or an improper application of that law. In these cases, the publicity benefits and expressive impact of trial cannot be captured by plea bargaining.

Trials impose costs on the prosecution, as well. As with the defense, the “expense” of trying a case consists of both the opportunity cost of the prosecutor’s time and the actual financial cost of trying a case.<sup>102</sup> Compare, for example, two hypothetical misdemeanor cases that carry similar prospective punishments. The first involves a simple battery; the second, a driving under the influence charge. Absent unusual facts, the first case is unlikely to be particularly expensive or time-consuming to try. The DUI case, on the other hand, may be significantly more costly. Most notably, modern DUI trials typically require expert testimony.<sup>103</sup> These additional witnesses not only drive up the financial cost of trying a case from the state’s perspective; they also make the case longer, and thus more demanding of the prosecutor’s finite time. Presumably, this additional “cost” increases the prosecutor’s incentive to negotiate a deal.<sup>104</sup>

Prosecutors may reject plea bargaining, meanwhile, in certain types of cases where *any* compromise would concede too much. This issue tends to arise when the prosecutor seeks the maximum possible punishment for a criminal act or

---

<sup>101</sup> See, e.g., Steve Kornacki, *Larry Craig’s Plea: Rationality, not ‘Panic,’* N.Y. OBSERVER, (Aug. 31, 2007, 4:37 p.m.), <http://www.observer.com/2007/larry-craigs-plea-rationality-not-panic> (observing that by entering a plea to morals offenses, former United States Senator Larry Craig kept “his secret safe for more than two months. Had he lawyered up and fought the charges, we would have known instantly.”).

<sup>102</sup> See Standen, *An Economic Perspective on Federal Criminal Law Reform*, *supra* note 37, at 259 (“In the disposition of [a] case by plea . . . punishment resources are exchanged for prosecutorial resources, as the prosecutor trades a selected term of imprisonment . . . for a savings in expenditures of his resources.”).

<sup>103</sup> Michael M. Brewer, *Tactically Developing Your Case*, ASPATORE 2 (2008) (“DUI cases almost always involve the use of expert scientific testimony by a government criminalist.”).

<sup>104</sup> See Easterbrook, *supra* note 24, at 297 (describing the difference between trial costs and settlement costs as bearing upon the prosecution’s incentive to agree to a plea deal, as opposed to taking a case to trial).

acts, or where the prosecutor insists upon a conviction to a particular crime, instead of a substitute offense.<sup>105</sup> As an example of the former situation, when the prosecution insists upon the death penalty, trial is virtually assured.<sup>106</sup> With the latter scenario, prosecutors may want to highlight their dedication to strict enforcement of a particular law, or type of laws.<sup>107</sup> Rejecting any plea bargains and taking these cases to trial unless the defendant “pleads to the sheet” represents a very visible means of displaying this commitment. Not infrequently, these interests coincide, particularly when violent crimes are involved. It is not by accident that murder cases tend to produce more trials (and acquittals) than most other crimes,<sup>108</sup> that bans or limits on plea bargaining announced by local prosecutors tend to curtail bargaining only as to serious or violent crimes;<sup>109</sup> or that prior surveys of plea bargaining and trial rates have observed that violent crimes tend to produce more trials than non-violent crimes do.<sup>110</sup>

---

<sup>105</sup> See Sudnow, *supra* note 127, at 274 (describing certain types of criminal cases, including “murders, embezzlements, multiple rape cases . . . large scale robberies, [and] dope ring operations” that “arouse public attention and receive special notice in the papers” and as to which “even were a guilty plea available, both parties feel uncomfortably obliged to bring issues of moral character in the courtroom.”).

<sup>106</sup> See Samuel R. Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 61 LAW & CONTEMP. PROB. 125, 145 (1998) (“In many capital cases . . . there is no plea bargaining.”).

<sup>107</sup> See Covey, *supra* note 58, at 230 (noting that in “high-visibility” cases, “prosecutors (and judges) are less likely to negotiate unduly lenient deals.”); Bibas, *supra* note 13, at 2472 (observing that ambitious prosecutors “may push strong or high-profile cases to trial to gain reputation and marketable experience”).

<sup>108</sup> BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, tbl. 5.34.2010 (May 28, 2011), <http://www.albany.edu/sourcebook/pdf/t5342010.pdf> (relating that in more than 30 percent of federal murder cases with sentences issued under the Federal Sentencing Guidelines in fiscal year 2010, the conviction was gained by way of trial—a figure far higher than that accompanying any other category of offense); COHEN & KYCKELHAHN, *supra* note 64, at 11, 16 (showing a significantly higher percentage of murder, voluntary manslaughter, and voluntary homicide cases being resolved through trial in surveyed large urban counties than any other felony offense); Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, *supra* note 63, at 2563 (“In murder cases, prosecutors generally pursue every case they can, which is why the acquittal rate in such cases is so much higher than for felonies generally. Cases cannot be dropped out of fear that the defendants might win at trial; voters may forgive an acquittal, but they surely won’t forgive blowing off a homicide.”).

<sup>109</sup> For examples of prosecutors who have announced no-plea-bargaining policies as to violent crimes, see Leslie Reed, *County Attorney: No More Plea Deals*, OMAHA WORLD-HERALD, Jan. 3, 2009, at 1A; Rob Johnson, *No Deals for Violent Crimes, D.A. Says*, THE COMMERCIAL APPEAL (Memphis, TN), Dec. 20, 1996, at A1; Pam Belluck, *Queens Prosecutor Bans Plea Bargaining in Felony Cases*, N.Y. TIMES, May 16, 1996, at B3; Ian Fisher, *Bronx District Attorney Moves to Ban Plea Bargains in Felony Cases*, N.Y. TIMES, Nov. 25, 1992 at B3; Jean Davidson, *Prosecutors Limit Plea Bargaining*, CHICAGO TRIBUNE, Dec. 16, 1982, at NW2.

<sup>110</sup> MATHER, *supra* note 53, at 142 (finding, upon a study of California plea-bargaining practices, that “The most important factor leading to a full court or jury trial was disagreement between defense and prosecution over the sentence in cases where severe punishment was likely.”); Elder, *supra* note 34, at 199 (concluding from an empirical study that “factors increasing the stakes [of a criminal case] reduce the probability of settlement”); Mellon, Jacoby & Brewer, *supra* note 52, at 77 (finding that the most serious, high-priority cases “generally go[] to trial”).



The expressive importance of obtaining a conviction for a particular offense also underscores how a prosecutor may not be exclusively concerned with the maximization of punishment in a particular case.<sup>111</sup> Assume, for example, that the defense in a high-profile and strong insider trading case in which the maximum possible sentence consists of two years in prison were to approach the prosecution with a settlement offer: the defendant will agree to serve the full two-year term, but on the condition that she plead guilty to only a (factually supported, but as yet uncharged) count of misprision of a felony,<sup>112</sup> to be alleged in a superseding indictment to be filed. I do not believe that all, or even most, prosecutors would accept this proposal, even though it removes any uncertainty associated with trial and would grant the prosecution the full quantum of custody it could obtain after trial on the charged offense. If this suspicion is correct, the reason must lie in the fact that with some crimes, prosecutors care first and foremost about obtaining a conviction for the charged offense. No plea deal to a different crime, regardless of its custody terms, will capture the same gains for the prosecution.

### C. Limited and Expansive Options

Finally, crimes also differ in the number and relative attractiveness of plausible plea-bargaining options that apply to the offense.

As previously discussed, as the odds of conviction decrease, the prosecutor presumably will become more willing to reduce her punishment demand. There are two ways that such a reduction may occur: the charge itself may permit negotiations over sentence length upon conviction, or the case may involve multiple charges, such that the parties can arrive upon more lenient punishment terms simply by agreeing that one or more charges will be dismissed in return for a defense plea. Yet crimes are not equally situated insofar as either “sentence bargaining” or “charge bargaining” are concerned.<sup>113</sup> With some

---

<sup>111</sup> Cf. RICHARD T. BOYLAN & CHERYL K. LONG, *SIZE, MONITORING AND PLEA RATE: AN EXAMINATION OF UNITED STATES ATTORNEYS* 17 (2000) (assuming that, in negotiating plea agreements, prosecutors seek to maximize the amount of time that defendants spend in custody); Standen, *An Economic Perspective on Federal Criminal Law Reform*, *supra* note 37, at 259 (observing that “[t]hrough charging decisions, the federal prosecutor owns the goods that are the criminal justice system allocates: terms of imprisonment.”).

<sup>112</sup> “Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.” 18 U.S.C. § 4 (2006).

<sup>113</sup> There exist two basic types of plea bargains: charge bargains and sentence bargains. “The prosecutor can either reduce the charge to one with a lower average penalty than the charge the defendant is facing, or offer a sentence more lenient than average by agreeing to a sentence at the low end of the applicable range of sentences for the charge. These processes are generally referred to as ‘charge bargaining’ and ‘sentence bargaining.’” Birke, *supra* note 9, at 219–20.



crimes, mandatory minimum sentences (or other non-negotiable components of punishment) block the first path to disposition by plea, and charge permutations may not exist that will allow the parties to reach mutually agreeable terms.

All else being equal, mandatory sentences will frustrate plea bargaining by limiting the parties' ability to negotiate acceptable terms.<sup>114</sup> More broadly, a defendant may be relatively uninspired to enter a guilty plea to a crime for which a large share of the punishment represents an unavoidable incident of *any* conviction, whether by plea or trial. Custody time is one form of punishment, but it is not necessarily the only result of a criminal conviction. A conviction also may lead to fines,<sup>115</sup> deportation,<sup>116</sup> registration as a sex offender,<sup>117</sup> restrictions on voting<sup>118</sup> and gun-ownership rights,<sup>119</sup> preclusion from certain types of employment,<sup>120</sup> a wide variety of probation conditions,<sup>121</sup> and stigma.<sup>122</sup> Some of these consequences may be non-negotiable, in the sense that the plausible plea options do not allow the defendant to avoid them. If so, the value of a guilty plea, or plea bargain, will be correspondingly less to the defense, and defendant will be relatively inclined to go to trial.

Of course, mandatory minimum sentences may not defeat plea bargaining; they may instead merely shift the parties' attention toward charge bargaining, in which one or more counts are dismissed (or never filed) in return for a defendant's guilty plea to other charges. Here, charge substance can catalyze or chill plea bargaining. Crimes vary in the extent to which they stand alone within a

---

<sup>114</sup> See Birke, *supra* note 9, at 226 (observing that “the existence of a mandatory sentencing regime increases the punishment value of a plea more than it increases the punishment value of a trial, and should militate in favor of more trials.”); Easterbrook, *supra* note 24, at 298 (noting that mandatory penalties may make settlements less frequent, insofar as they may decrease the gains of trade).

<sup>115</sup> See U.S. SENTENCING GUIDELINES MANUAL § 5E1.2 (2011) (relating Guideline ranges for fines).

<sup>116</sup> AMERICAN BAR ASSOCIATION COMMISSION ON EFFECTIVE CRIMINAL SANCTIONS & THE PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA, INTERNAL EXILE: CONSEQUENCES OF CONVICTION IN FEDERAL LAWS AND REGULATIONS 43–45 (2009).

<sup>117</sup> *Id.* at 41–42.

<sup>118</sup> *Id.* at 15.

<sup>119</sup> *Id.* at 42–43.

<sup>120</sup> *Id.* at 19–27.

<sup>121</sup> See Andrew Horwitz, *Coercion, Pop-Psychology, and Judicial Moralizing: Some Proposals for Curbing Judicial Abuse of Probation Conditions*, 57 WASH. & LEE L. REV. 75, 110–53 (2000) (relating a wide variety of probation conditions); Note, *Judicial Review of Probation Conditions*, 67 COLUM. L. REV. 181, 182–88 (1967) (same).

<sup>122</sup> “Stigma is characterized as an external incentive founded on the reluctance of individuals to interact with a person who breaches social norms. Stigma can be either economic (for example, lower wages) or social (for example, difficulty in finding a spouse).” Alon Harel & Alon Klement, *The Economics of Stigma: Why More Detection of Crime May Result in Less Stigmatization*, 36 J. LEGAL STUD. 355, 355 (2007). For a robust discussion of stigma and its relationship to punishment, see W. David Ball, *The Civil Case at the Heart of Criminal Procedure: In re Winship, Stigma, and the Civil-Criminal Distinction*, 38 AM. J. CRIM. L. 117, 146–48 (2011).

code, or are ensconced among multiple related offenses. This, too, is a function of crime content; some crimes involve behavior that is closely connected to other offenses (such as gun crimes and drug offenses, or theft and possession of stolen property), while other courses of criminal conduct tend to implicate only a single crime, which must be charged on its own, or not at all. Depending on the scenario, these crime clusters may be either conducive or inhospitable to plea bargaining. Furthermore, a crime's position within this grouping will affect its encouragement of, and disposition within, these deals.

The connections, if any, that may exist between a crime and other offenses matter because of their effect upon both initial charging practices (which may prompt plea negotiations), and plea deals themselves. Stacked charges oftentimes produce asymmetrical stakes for the parties, which may be conducive to horse-trading. If a crime tends to overlap with other offenses, such that a given course of conduct by a defendant implicates multiple different crimes, prosecutors may be in a position to charge all of the implicated offenses.<sup>123</sup> Doing so may encourage a defendant to enter into plea talks if the allegation of multiple offenses either increases the likelihood of conviction or threatens greater punishment upon conviction.<sup>124</sup> At the same time, the prosecution may not have an equivalent, offsetting desire to retain the additional charges, particularly if they are in some way ancillary to the gist of the defendant's misconduct.<sup>125</sup> A prosecutor may be willing to jettison these surplus counts, if doing so induces a plea to the central allegations in the case.

In some situations, however, tight bonds among related offenses may have the opposite effect, chilling plea negotiations and pushing cases toward trial. If even one charged offense among several is susceptible to trial, the parties may decide to try all of the other charges, as well; since a trial will take place anyway, the incremental cost of trying the additional counts may be relatively low. This dynamic may appear when the charge that draws others to trial threatens significant irreducible punishment, and represents the crux of the state's case against the defendant. Under these circumstances, this "immovable" and "irreducible" count is less likely to become the subject of bargaining. When this situation arises, charges that normally would produce plea bargains are effectively dragged to trial by other offenses. Furthermore, charge-stacking may add to the complexity of a criminal case and, by doing so, prevent the parties from agreeing upon a disposition by introducing disagreement as to likely outcomes.

---

<sup>123</sup> STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE*, *supra* note 57, at 263.

<sup>124</sup> *Id.*

<sup>125</sup> See Graham, *Facilitating Crimes*, *supra* note 60, at 693 (discussing how crimes such as hostage-taking (18 U.S.C. § 1203) and use of fire or explosives in the commission of a federal felony (18 U.S.C. § 844(h)) are often dismissed pursuant to plea bargains).

The *positioning* of a crime relative to other offenses affects plea bargaining as much as its *proximity* to these crimes does. All else being equal, a crime is more susceptible to charge bargaining<sup>126</sup> when it claims attractive “landing points” for these deals. These “landing points” are related offenses that carry a gravamen similar to that of the bargained-down crime, but with slightly less severe sentencing consequences.<sup>127</sup> As a corollary, crimes positioned near the top of the sentencing “slope” that is created by mapping the penalties attached to related crimes presumably will produce more charge bargains, though this may be offset by prosecutorial reluctance to offer significant concessions when serious offenses are involved. Less severe crimes within a cluster of related offenses will generate fewer such agreements.<sup>128</sup> So too will crimes that lack *any* related offenses that may function as “landing points.”<sup>129</sup>

From the text above, one might conclude that crimes tend to produce more, and more consistently framed, pleas when they are simple to prove, alleged with significant frequency, and have “stakes” as to which both the prosecution and the defense can obtain significant value from a plea, relative to trial. In essence, the more a crime can be commoditized, the more susceptible it will be to plea bargaining. The next section of this article seeks to put flesh on the bones of this hypothesis by reviewing several years’ worth of federal charging and case termination data.

### III. FEDERAL DATA ON PLEA BARGAINING AND TRIALS

The Administrative Office of the United States Courts (AOUSC) collects a wealth of information regarding each criminal case that terminates in federal district court.<sup>130</sup> One series of datasets, released annually, includes the judicial district in which each prosecution occurred, the five “most serious” charges filed as to each defendant (as determined by the “base offense level” assigned to the

---

<sup>126</sup> There exist two basic types of plea bargains: charge bargains and sentence bargains. “The prosecutor can either reduce the charge to one with a lower average penalty than the charge the defendant is facing, or offer a sentence more lenient than average by agreeing to a sentence at the low end of the applicable range of sentences for the charge. These processes are generally referred to as ‘charge bargaining’ and ‘sentence bargaining.’” Birke, *supra* note 9, at 219–20.

<sup>127</sup> Wright & Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power*, *supra* note 19, at 1953–54. For a discussion of how prosecutors and defense attorneys locate and agree upon plausible landing points, see David Sudnow, *Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office*, 12 SOCIAL PROBLEMS 255, 258–59, 262–64 (1965).

<sup>128</sup> Wright & Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power*, *supra* note 19, at 1953–55.

<sup>129</sup> *Id.*

<sup>130</sup> AOUSC Database, *supra* note 2.

crime under the Federal Sentencing Guidelines<sup>131</sup>), the five “most serious” charges at the time of case termination, the manner in which these charges were resolved (e.g., dismissal by the prosecution, guilty plea, or conviction or acquittal at trial<sup>132</sup>), the sentence issued by the court, and related information.<sup>133</sup>

The discussion below draws upon these records to explore the connections that may exist among charge substance, plea bargaining, and trial rates. Specifically, the text will consider data regarding criminal cases that terminated in federal district court between October 1, 2002 and September 30, 2009.<sup>134</sup> This information comes from AOUSC datasets compiled for FY2003 (October 1, 2002 to September 30, 2003) through FY2009 (October 1, 2008 to September 30, 2009).<sup>135</sup>

This review will begin with some aggregate information concerning the records in the database and summary data regarding plea bargaining, trial frequency, and trial outcomes. The analysis then will turn to a review of specific crimes with extremely high and low charge-bargain, trial, and acquittal rates. As will be shown, offenses perched at these extremes tend to share certain characteristics, patterns that hint at the effects that charge content may have on plea bargaining and trials.

---

<sup>131</sup> The “base offense level” represents the starting point for sentencing calculations under the Federal Sentencing Guidelines, with higher base offense levels translating into lengthier Guidelines-prescribed advisory terms. ROGER W. HAINES, JR., FRANK O. BOWMAN, III & JENNIFER C. WOLL, *FEDERAL SENTENCING GUIDELINES HANDBOOK* 1305 (2010).

<sup>132</sup> The principal disposition codes used by the AOUSC are: 1 (dismissal), 2 (acquittal after a bench trial); 3 (acquittal after a jury trial), 4 (guilty plea), 5 (nolo contendere plea), 8 (conviction after a bench trial), 9 (conviction after a jury trial), A (nolle prosequi), B (pretrial diversion), C (mistrial), and D (dismissed without prejudice). *E.g.*, INTER-UNIVERSITY CONSORTIUM FOR POLITICAL AND SOCIAL RESEARCH, *FEDERAL JUSTICE STATISTICS PROGRAM: DEFENDANTS IN FEDERAL CRIMINAL CASES IN DISTRICT COURT-TERMINATED, 2007* [UNITED STATES] 144 (2008).

<sup>133</sup> As to each record, the dataset relates 177 fields of information. For purposes of this article, the most important of these fields are DISTRICT, which identifies the judicial district in which a case was filed; FLINDEX1, FLINDEX2, FLINDEX3, FLINDEX4, and FLINDEX5, which relate the codes assigned to the five “most serious” initial charges in a case (with these codes typically taking the form of the title and section of the United States Code that relates the offense, as well as additional identifying elements in situations where a statute describes more than one crime); TRINDEX1, TRINDEX2, TRINDEX3, TRINDEX4, and TRINDEX5, which relate the codes assigned to the five “most serious” charges at the time of case termination; DISP1, DISP2, DISP3, DISP4, and DISP5, which relate the disposition of the five “most serious” crimes; PRISTOT, which relates the total prison time imposed upon each defendant; TTSECMO, which relates the title and section of the United States Code of the most serious terminating offense in the case; and FILEINDEX, which relates which, among the initial charges, represented the most serious charging offense.

<sup>134</sup> Earlier datasets (e.g., for FY2000, FY2001, and FY2002) in the same BJS / AOUSC series do not provide complete information regarding case outcomes, and thus were not included within the study.

<sup>135</sup> AOUSC Database, *supra* note 2.

## A. Basic Information

The dataset compiled from the AOUSC records consists of 623,430 records in all.<sup>136</sup> As contained in the database, each record relates to a single defendant in a single case, such that one case that involves multiple defendants may entail several records. For convenience, however, the text below will refer to each record as a separate “case.”

Of the 623,430 cases contained within the database, 538,085 involve at least one count that was resolved via a guilty or no-contest plea.<sup>137</sup> Meanwhile, 25,190 cases include at least one count that was resolved via a trial verdict.<sup>138</sup> (In all, the database relates the outcome of 1,231,640 terminated counts, or charges.<sup>139</sup>) Overall, 21 percent of counts tried to a verdict<sup>140</sup> yielded acquittals, leaving an overall conviction rate of 79 percent.<sup>141</sup> The overall acquittal rate is skewed upward by a large number of trials of miscellaneous vehicle-code infractions that occur on federal property. These trials often result in acquittals.<sup>142</sup> If these cases are removed from the database, the acquittal rate drops to 20 percent of all counts.<sup>143</sup>

The roster of federal offenses is too extensive to assess the pleading and trial practices that surround each and every crime. Instead, the text below will

---

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* Crimes have been assigned identification codes by the AOUSC. A list of the codes, as made available through the website for the United States District Court for the Western District of Pennsylvania, can be found at <http://www.pawd.uscourts.gov/Documents/Forms/Criminal%20Citation%20Manual.pdf> (henceforth “Criminal Citation Manual.”) This total number of counts in the database does not include every charge that was alleged and resolved in a criminal case over the studied period, however. Each case within the database relates only the five “most serious” charges at the time of original filing, and at case termination. Thus, to the extent that a criminal case alleged a sixth, seventh, or higher count, the dataset does not capture this information. Though a gap, only a small percentage of federal cases involve more than five counts. The truncation therefore has only a modest effect on the overall results—though it may have a more substantial impact on data relating to those crimes, such as wire fraud and mail fraud, which are sometimes alleged in bulk.

<sup>140</sup> AOUSC Database, *supra* note 2. The very few counts that reported a guilty or not-guilty verdict on an insanity plea were disregarded for purposes of determining conviction rates.

<sup>141</sup> *Id.* This acquittal-rate figure likely understates defendants’ overall trial “success” on a count-by-count basis. The AOUSC does not assign a distinct code to count dismissals that occur in the course of trial, as opposed to dismissals that occur at an earlier point in the proceedings. Thus, for purposes of calculating acquittal rates, the author simply summed not-guilty verdicts issued by juries and judges, and divided this total by the sum of jury and bench acquittals and convictions. To the extent that mid-trial dismissals also represent defense “wins,” the acquittal figures do not capture these victories.

<sup>142</sup> *Id.* These charges were assigned the code 18:13-7220.M within the AOUSC Database, and have an acquittal rate of 64 percent. *Id.*

<sup>143</sup> AOUSC Database, *supra* note 2.

focus on specific offenses, and in particular, those that lie at the extremes of the plea bargaining and trial data.

## B. Plea Bargaining

The AOUSC Database does not readily permit inquiries into simple sentence bargaining, since it does not include information (such as each defendant's criminal history, or the specific sentence enhancements or downward departures implicated in a case) that affect the sentencing calculations that apply to an individual defendant under the Federal Sentencing Guidelines.<sup>144</sup> By relating the “most serious” charges at the time of filing and case termination, however, the data do allow for a study of charge bargaining in federal practice.<sup>145</sup>

For one thing, the data indicate that federal prosecutors are quite willing to dismiss or reduce certain crimes pursuant to plea deals.<sup>146</sup> Elsewhere, I have referred to crimes that are commonly jettisoned in plea bargaining as “charging crimes.”<sup>147</sup> The inclusion of these crimes within cases may facilitate plea bargaining insofar as they threaten significant incremental punishment upon conviction, yet are understood by all parties as being subject to negotiation.

One rough proxy for a given crime's status as a charging crime is to assess the frequency with which it relinquished its status as the most serious charging offense (referred to in the tables below as “MSCO”) in a case pursuant to a plea. This measure of the “integrity rate” of an offense reflects the crime's susceptibility to dismissal as part of a plea bargain. Following are crimes with particularly low integrity rates over the FY2003–FY2009 span:

---

<sup>144</sup> For roughly the latter two-thirds of the studied time period, the Sentencing Guidelines were not mandatory, such that a sentencing judge did not necessarily have to regard a nominal “most serious” offense as such. *See* *United States v. Booker*, 543 U.S. 220, 245 (2005).

<sup>145</sup> The base offense level represents an imperfect guide to charge severity. The assignment of “most serious” status based on base offense level alone may be inadequate where, for example, large amounts of drugs or stolen money are involved. These amounts may substantially increase the assigned punishment above that associated with the “normal” base offense level for a crime. *See* U.S. SENTENCING GUIDELINES MANUAL §§ 2B1.1(b)(1), 2D1.1(c) (2011) (relating the base offense levels associated with amounts of money purloined and various drug quantities, respectively).

<sup>146</sup> Per Department of Justice policy in effect for much of the studied time period, as a general matter, “federal prosecutors must charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case.” John Ashcroft, Memorandum from Attorney General to All Federal Prosecutors, Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing (Sept. 22, 2003) (on file with author), *available at* [http://www.justice.gov/opa/pr/2003/September/03\\_ag\\_516.htm](http://www.justice.gov/opa/pr/2003/September/03_ag_516.htm).

<sup>147</sup> Graham, *Facilitating Crimes*, *supra* note 60, at 686–95.

**Table I: Federal Felonies with Low “Integrity Rates”  
FY2003-FY2009 (100+ MSCO Cases Involving Guilty / No Contest Pleas)<sup>148</sup>**

Crime	Description	Total Number of MSCO Cases	MSCO Cases Where Also Most Serious Terminating Offense (MSTO)	Integrity Rate
18 U.S.C. § 1512(a) <sup>149</sup>	Witness tampering by force / threat of force	210	73	34.8%
18 U.S.C. § 1203 <sup>150</sup>	Hostage taking	336	134	39.9%
18 U.S.C. § 844(h) <sup>151</sup>	Use of fire / explosives in a federal felony	321	131	40.8%
18 U.S.C. § 924(j) <sup>152</sup>	Violent Crime / Drugs / Gun / Death Occurs	188	79	42.0%

These crimes have something in common: They tend to be ancillary to the gravamen of most criminal cases in which they appear.<sup>153</sup> Witness tampering (18 U.S.C. § 1512(a)) presumes the existence of a pending, or potential, federal case. So does hostage taking (18 U.S.C. § 1203), and the use of firearms or explosives in the commission of another federal offense (18 U.S.C. § 844(h)). This common characteristic ensures, first, that these charges are typically alleged with another federal crime that may serve as the basis for a plea bargain; and second, that a prosecutor will not believe herself to have bargained away the tent-pole of her case if she chooses to dismiss the charge pursuant to a plea bargain to other counts.

<sup>148</sup> The table is derived from data in the AOUSC Database, *supra* note 2.

<sup>149</sup> Section 1512(a) of Title 18 prohibits actual and attempted witness tampering by means of force or threats of force. *United States v. Lester*, 749 F.2d 1288, 1293 (9th Cir. 1984). The AOUSC uses a distinct code to identify those cases in which this tampering results in the death of a witness.

<sup>150</sup> “[W]hoever . . . seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third person or a governmental organization to do or abstain from doing any act as an explicit or implicit condition for the release of the person detained, or attempts or conspires to do so, shall be punished . . .” 18 U.S.C. § 1203(a) (2006).

<sup>151</sup> Under 18 U.S.C. § 844(h), whoever “uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States, or . . . carries an explosive during the commission of any felony which may be prosecuted in a court of the United States . . .” shall be sentenced to 10 years imprisonment. 18 U.S.C. § 844(h) (2006).

<sup>152</sup> Per 18 U.S.C. § 924(j), “a person who, in the course of a violation of subsection (c) [use of a firearm in the commission of a federal felony], causes the death of a person through the use of a firearm, shall—(1) if the killing is a murder (as defined in section 1111) be punished by death or by imprisonment for any term of years or for life; and (2) if the killing is manslaughter (as defined in section 1112), be punished as provided in that section.” 18 U.S.C. § 924(j) (2006).

<sup>153</sup> *Graham, Facilitating Crimes, supra* note 60, at 694.

Other crimes, though not present within the table above, may catalyze plea bargaining in similar ways. A crime that does not represent the most serious charge in a case, but which threatens some additional punishment upon conviction, also may encourage negotiations by providing the prosecution with an expendable charge. It has been suggested, for example, that the enhancement for the use of a firearm in the commission of a federal felony, codified at 18 U.S.C. § 924(c),<sup>154</sup> often represents a “bargaining chip” in federal drug cases.<sup>155</sup> The data provide some support for this supposition. Between FY 2003 and FY 2009, a total of 26,680 section 924(c) charges were alleged in cases that resolved, in whole or in part, by a defendant’s guilty or no-contest plea.<sup>156</sup> Of these § 924(c) charges, fully 45 percent were dismissed either prior to, or as part of, the defendant’s plea.<sup>157</sup> This is a relatively high figure,<sup>158</sup> particularly for a crime that carries a full consecutive sentence (such that its dismissal would not represent a *pro forma* act by the prosecution); by comparison, less than 40 percent of all counts within the database were dismissed in cases that terminated by plea.<sup>159</sup>

Meanwhile, the crimes that claim the highest integrity rates—which suggests very few charge bargains, at least to those crimes in particular—were misdemeanors.<sup>160</sup> Among felonies, the crimes with the highest integrity rates included:

---

<sup>154</sup> Section 924(c) of Title 18 provides that a five-year (or higher) sentence enhancement is to be imposed upon “any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm.” 18 U.S.C. § 924(c) (2006).

<sup>155</sup> BUREAU OF JUSTICE STATISTICS, FEDERAL FIREARM OFFENDERS, 1992–98 6 (2000) (discussing the frequent dismissal of 924(c) charges); Nagel & Schulhofer, *supra* note 52, at 548–49, 551–52 (remarking on the dismissal of 924(c) counts in certain types of cases).

<sup>156</sup> AOUSC Database, *supra* note 2.

<sup>157</sup> *Id.*

<sup>158</sup> At the same time, a 45 percent dismissal rate pursuant to pleas is hardly extreme, or particularly telling. Fully 71.9 percent of hostage-taking counts (18 U.S.C. § 1203) were dismissed in cases resolved by plea, AOUSC Database, *supra* note 2, and several frequently alleged drug crimes had dismissal rates hovering around 50 percent. Near the other end of the spectrum, counts under 8 U.S.C. § 1326 were dismissed less than 10 percent of the time in pled matters. AOUSC Database, *supra* note 2.

<sup>159</sup> *Id.*

<sup>160</sup> The following misdemeanors all claimed an integrity rate of at least 99.5 percent: 18 U.S.C. § 1028(a) (fraud with identification documents); 18 U.S.C. § 1703(b) (delay or destruction of mail); 18 U.S.C. § 3615 (failure to pay a fine); 26 U.S.C. § 7203(c) (willful failure to file a tax return); and 18 U.S.C. § 656 (theft or embezzlement by a bank officer). AOUSC Database, *supra* note 2.



**Table II: Federal Felonies with High “Integrity Rates”  
FY2003-FY2009 (250+ MSCO Cases Involving Guilty / No Contest Pleas)<sup>161</sup>**

Crime	Description	Total Number of MSCO Cases	Number of MSCO Cases Where Also MSTO	Integrity Rate
18 U.S.C. § 4	Misprision of a felony	857	853	99.5%
18 U.S.C. § 751(a) <sup>162</sup>	Escape	1,564	1,549	99.0%
18 U.S.C. § 2252(a) <sup>163</sup>	Sale, etc., of child pornography	4,879	4,815	98.7%
8 U.S.C. § 1326 <sup>164</sup>	Re-entry by a deported alien	85,779	83,984	97.9%
18 U.S.C. § 3146(a) <sup>165</sup>	Failure to appear	462	450	97.4%
18 U.S.C. § 922(n) <sup>166</sup>	Interstate transp. of a firearm / felon	1,130	1,099	97.3%

Just as the offenses with the lowest integrity rates share certain attributes, so do the crimes with the highest such rates.<sup>167</sup> Namely, these crimes are among

<sup>161</sup> The table is derived from data in the AOUSC Database, *supra* note 2.

<sup>162</sup> “A conviction for escape under § 751(a) requires proof of three elements. The Government must show that the defendant made 1) an unauthorized departure or escape, 2) from custody of an institution where the prisoner is confined by direction of the Attorney General, 3) where the custody or confinement is by virtue either of arrest for a felony or conviction of any offense.” *United States v. Taylor*, 933 F.2d 307, 309 (5th Cir. 1991).

<sup>163</sup> Subdivision (a) of section 18 U.S.C. § 2252 prohibits the sale, transportation, distribution, receipt, or possession (provided a jurisdictional nexus is satisfied) of “visual depiction[s] . . . [that involve] the use of a minor engaging in sexually explicit conduct,” where the depictions are of such conduct. *Id.*

<sup>164</sup> To the extent that the tables relate data involving 8 U.S.C. § 1326, the figures presented relate the summed total for counts alleged under 8 U.S.C. § 1326, 8 U.S.C. § 1326(a) and 8 U.S.C. § 1326(b), which were assigned separate codes within the AOUSC data. All three codes displayed similar tendencies.

<sup>165</sup> Under 18 U.S.C. § 3146(a), a person who has been released by the court pending criminal proceedings yet who “fails to appear before a court as required by the conditions of release,” or who “fails to surrender for service of sentence pursuant to a court order,” is guilty of either a felony or a misdemeanor, depending on the circumstances. *Id.* “To establish a violation of 18 U.S.C. § 3146, the government ordinarily must prove that the defendant (1) was released pursuant to that statute, (2) was required to appear in court, (3) knew that he was required to appear, (4) failed to appear as required, and (5) was willful in his failure to appear.” *Weaver v. United States*, 37 F.3d 1411, 1412–13 (9th Cir. 1994).

<sup>166</sup> “It shall be unlawful for any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce any firearm or ammunition or receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.” 18 U.S.C. § 922(n) (2006).

<sup>167</sup> See *Graham, Facilitating Crimes*, *supra* note 60, at 692 (describing some of the characteristics of crimes with high “integrity rates”). At the same time, the appearance of a crime within this table does not preclude the possibility of plea bargaining along other dimensions. The

the easiest federal crimes to prove. The simplicity of proving re-entry of a deported felon already has been discussed. An escape charge is similarly easy to establish: the defendant was in custody; then, they were not.<sup>168</sup> Similarly, a charge alleging a failure to appear is virtually bulletproof for the prosecution, assuming that the defendant was previously advised of the need to show up in court (a matter typically capable of ready and virtually unassailable proof by simple resort to judicial minutes).<sup>169</sup> With these offenses, defendants likely reason that a pretrial guilty plea, with credit for early acceptance of responsibility, offers as good an outcome as they can reasonably expect. Meanwhile, the crime with the highest “integrity rate”—misprision of a felony—is a “pleading crime” that parties often agree upon as the basis of a plea deal, often even before the prosecution files charges.<sup>170</sup>

---

parties in drug cases can bargain over the quantities of drugs for which a defendant will be held responsible; the defense and prosecution in a child-pornography may negotiate over the number of images that the defendant possessed; etc. These quantities may have a significant impact on the sentence ultimately imposed by the court. Likewise, in cases where the defendant committed the same crime on multiple occasions, prosecutors may agree to dismiss a second, third, or additional count that alleges the same offense as the “lead” charge. *See* Nagel & Schulhofer, *supra* note 52, at 548. In each of these instances, one must engage in a more sensitive analysis than the mere documentation of integrity rates to understand the nature of the bargaining process.

<sup>168</sup> Significantly, escape “does not require that a defendant have a specific intent to escape; all the prosecution must show is that the defendant knew that his actions would result in his absence from confinement without permission.” *United States v. Taylor*, 933 F.2d 307, 310 (5th Cir. 1991), citing *United States v. Bailey*, 444 U.S. 394 (1980).

<sup>169</sup> *Weaver v. United States*, 37 F.3d 1411, 1412–13 (9th Cir. 1994)

<sup>170</sup> *See* Graham, *Facilitating Crimes*, *supra* note 60, at 697–98 (discussing “pleading crimes”).

## C. Trials

Just as some crimes are more conducive to charge bargains than others are, some offenses produce more trials than others do. Overall, only 4.4 percent of all charged counts went to trial.<sup>171</sup> Yet significant variation in trial rates appears across offenses. The following crimes proceeded to trial most often, relative to how often they were alleged:

**Table III: Highest Percentage of Counts Tried, Federal Felonies  
FY2003-FY2009 (200+ Counts)<sup>172</sup>**

Crime	Description	Total Number of Terminating Counts	Total Number of Tried Counts	Percentage of Counts Tried
18 U.S.C. § 242	Deprivation of Civil Rights	481	145	30.1%
26 U.S.C. § 7212(a) <sup>173</sup>	Corrupt / Forcible Interference / IRS	273	66	24.2%
18 U.S.C. § 241 <sup>174</sup>	Conspiracy Against the Rights of Citizens	406	93	22.9%
18 U.S.C. § 924(j)	Violent Crime / Drugs / Firearm / Death Occurs	395	89	22.5%
18 U.S.C. § 1959 (7474) <sup>175</sup>	Racketeering / Violent Crimes	227	50	22.0%

<sup>171</sup> AOUSC Database, *supra* note 2. Counts that were dismissed by the prosecution at trial are not assigned a code distinct from the “generic” code for count dismissal, meaning that this 4.4 percent figure—which does not include dismissed counts—may slightly underestimate the total number of tried counts.

<sup>172</sup> The information in this table is derived from data in the AOUSC Database, *supra* note 2.

<sup>173</sup> This statute, part of the Internal Revenue Code, makes it a federal offense to “corruptly or by force or threats of force (including any threatening letter or communication) endeavor[] to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, or in any other way corruptly or by force or threats of force (including any threatening letter or communication) obstruct[] or impede[], or endeavor[] to obstruct or impede, the due administration of this title.” 26 U.S.C. § 7212(a) (2006).

<sup>174</sup> Under this statute, a felony has been committed “If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same,” or “If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured.” 18 U.S.C. § 241 (2006).

<sup>175</sup> Section 1959 of Title 18 of the United States Code relates a felony offense when someone, “as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, kidnaps, maims, assaults with a dangerous weapon, commits

Crime	Description	Total Number of Terminating Counts	Total Number of Tried Counts	Percentage of Counts Tried
18 U.S.C. § 1958 (7471) <sup>176</sup>	Racketeering – Murder	427	92	21.5%
18 U.S.C. § 666(c) <sup>177</sup>	Embezzlement Involving Federal Programs	434	87	20%

Again, several of these crimes have something in common: they carry extremely high stakes for both the prosecution and the defense—suggesting a large “non-negotiable” component in each prosecution. Indeed, several of these crimes may be punishable by death.<sup>178</sup> Meanwhile, the offenses related at 18 U.S.C. § 241 and § 242 commonly involve public officials as defendants. This circumstance may frustrate plea bargaining for several reasons, as related in Part II.A.1, *supra*. Somewhat similarly, while the offenses described at 18 U.S.C. § 1512(a) through (c) narrowly missed inclusion on the list of most commonly tried crimes,<sup>179</sup> their high trial rates underscore how the prosecution has a strong incentive to spotlight these witness-intimidation and falsified-evidence cases through robust prosecution, while the defendants in these matters already have signaled their intention to fight the charges against them with all means at their disposal.<sup>180</sup>

---

assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires so to do.” 18 U.S.C. § 1959(a) (2006).

<sup>176</sup> Under 18 U.S.C. § 1958(a),

Whoever travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or uses or causes another (including the intended victim) to use the mail or any facility of interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, or who conspires to do so, shall be fined under this title or imprisoned for not more than ten years, or both; and if personal injury results, shall be fined under this title or imprisoned for not more than twenty years, or both; and if death results, shall be punished by death or life imprisonment, or shall be fined not more than \$250,000, or both.

18 U.S.C. § 1958 (2006).

<sup>177</sup> This code denotes one of embezzlement offenses described at 18 U.S.C. § 666 (2006), which makes it a federal crime to embezzle \$5,000 or more from an institution that receives at least \$10,000 a year in federal benefits.

<sup>178</sup> *E.g.*, 18 U.S.C. § 924(j) (2006) (providing, through a cross-reference to 18 U.S.C. § 1111, for death as a possible punishment for murder though use of a firearm in the commission of a federal drug-trafficking crime or federal crime of violence); 18 U.S.C. § 1512(a)(3)(A) (2006) (providing, also through a cross-reference to 18 U.S.C. § 1111, for death as a possible punishment

For purposes of comparison, the following federal felonies<sup>181</sup> go to trial the *least* often:

**Table IV: Lowest Percentage of Counts Tried, Federal Felonies  
FY2003-FY2009 (200+ Counts)<sup>182</sup>**

Crime	Description	Total Number of Terminating Counts	Total of Tried Counts	Percentage of Counts Tried
18 U.S.C. § 4 <sup>183</sup>	Misprision of a felony	3,672	14	.4%
8 U.S.C. § 1325 <sup>184</sup>	Improper entry by an alien	14,852	75	.5%
8 U.S.C. § 1326	Re-entry of a deported alien	98,201	534	.5%
18 U.S.C. § 1543 <sup>185</sup>	Forgery or use of a forged passport	1,567	11	.7%

Unlike the most commonly tried crimes, these offenses tend to be minor and easily commoditized, such that a “going rate” for a guilty plea will coalesce around them in short order. The appearance of 18 U.S.C. § 4 and 8 U.S.C. § 1326 on this list come as little surprise. As mentioned before, misprision of a felony is invoked in connection with pre-arranged plea bargains; with 8 U.S.C. § 1326 (as well as 8 U.S.C. § 1325), convictions are so easy to obtain, the defense receives

---

for the killing of a witness); 18 U.S.C. § 1958(a) (2006) (providing for punishment by death or life imprisonment if death results from a murder-for-hire scheme that involves interstate commerce).

<sup>179</sup> The composite trial rate for the offenses related at 18 U.S.C. § 1512(a) through (c) was 19.3 percent. AOUSC Database, *supra* note 2.

<sup>180</sup> The offense related at 26 U.S.C. § 7212(a) is similarly situated.

<sup>181</sup> The absolute lowest trial rate among all commonly charged federal crimes belongs to 18 U.S.C. § 1028(a) (fraud with identification documents), when charged as a misdemeanor, as to which only four out of 4,989 terminating counts were resolved by trial.

<sup>182</sup> The table is derived from data in the AOUSC Database, *supra* note 2.

<sup>183</sup> As previously related, the low trial rate for 18 U.S.C. § 4 (misprision of a felony) owes to its status as a pleading crime—an offense that the parties in a variety of cases in which other, more serious crimes either were or might have been charged agree upon as a means of resolving these cases by way of plea. *See* text accompanying note 170, *supra*. Tellingly, there were 3,376 reported convictions among the 3,672 terminating counts ascribed to 18 U.S.C. § 4 within the database.

<sup>184</sup> Under this statute, “Any alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact” is guilty of a misdemeanor (for a first offense); subsequent convictions can lead to imprisonment for up to two years. 8 U.S.C. § 1325 (2006).

<sup>185</sup> This offense applies to “Whoever falsely makes, forges, counterfeits, mutilates, or alters any passport or instrument purporting to be a passport, with intent that the same may be used; or [¶] Whoever willfully and knowingly uses, or attempts to use, or furnishes to another for use any such false, forged, counterfeited, mutilated, or altered passport or instrument purporting to be a passport, or any passport validly issued which has become void by the occurrence of any condition therein prescribed invalidating the same.” 18 U.S.C. § 1543 (2006).

little to no benefit from taking a case to trial, relative to the early entry of a guilty plea.

#### **D. Trial Outcomes**

On its own, data concerning trial *rates* says little about the relationship between plea bargaining and the ease or difficulty of proving a charge. To establish such a connection, one also must consider trial *outcomes*. Following are the federal felonies with the highest acquittal rates at trial:

**Table V: High Acquittal Rates, Federal Felonies, 75+ Tried Counts**  
**FY 2003–FY2009<sup>186</sup>**

High Acquittal Rate	Offense Description	Number of Tried Counts	Number of Count Acquittals	Acquittal Percentage
18 U.S.C. § 242	Deprivation of civil rights	145	80	55.2%
18 U.S.C. § 241	Conspiracy to deprive of civil rights	93	44	47.3%
18 U.S.C. § 113(a)(3) <sup>187</sup>	Assault with a dangerous weapon	123	57	46.3%
21 U.S.C. § 844 <sup>188</sup> (marijuana)	Possession of marijuana	97	44	45.4%
18 U.S.C. § 113(a)(6) <sup>189</sup>	Assault resulting in serious bodily injury	82	35	42.7%
18 U.S.C. § 113(a)(1) <sup>190</sup>	Assault with intent to murder	173	70	40.5%
18 U.S.C. § 2241(a) <sup>191</sup>	Aggravated sexual abuse	114	43	38.3%
21 U.S.C. § 952 (marijuana) <sup>192</sup>	Importation of marijuana	189	71	37.6%

<sup>186</sup> The table is derived from data in the AOUSC Database, *supra* note 2.

<sup>187</sup> Section 113 of Title 18 of the United States Code concerns assaults committed within the territorial or maritime jurisdiction of the United States. Per subdivision (a)(3), whoever commits an “[a]ssault with a dangerous weapon, with intent to do bodily harm, and without just cause or excuse, by a fine under this title or imprisonment for not more than ten years, or both.” 18 U.S.C. § 113(a)(3) (2006).

<sup>188</sup> Under 21 U.S.C. § 844(a), “It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II of this chapter.” 21 U.S.C. § 844(a) (2006). The code above refers only to the possession of marijuana.

<sup>189</sup> Per 18 U.S.C. § 113(a)(6), an “[a]ssault resulting in serious bodily injury [is punishable] by a fine under this title or imprisonment for not more than ten years, or both.” 18 U.S.C. § 113(a)(6) (2006).

<sup>190</sup> Per 18 U.S.C. § 113(a)(1), an “[a]ssault with intent to commit murder [is punishable] by imprisonment for not more than twenty years.” 18 U.S.C. § 113(a)(1) (2006).

<sup>191</sup> This law, which essentially relates the crime of aggravated rape, provides that one who, within the maritime or territorial jurisdiction of the United States or while in federal custody “knowingly causes another person to engage in a sexual act--(1) by using force against that other person; or (2) by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping; or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.” 18 U.S.C. § 2241(a) (2006).

<sup>192</sup> Per 21 U.S.C. § 952(a), “It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof” a variety of controlled substances, narcotics, or ephedrine, pseudoephedrine, or phenylpropanolamine. *Id.* The code above refers only to the importation of marijuana, which is classified as a controlled substance under federal law. 21 C.F.R. § 1308.11 (2011). For unknown reasons, the AOUSC Database utilizes multiple codes for marijuana importation; the figure above represents a composite of these codes. As will be discussed *infra*, regardless of the code that is used to describe them, these charges exhibit similar characteristics.

High Acquittal Rate	Offense Description	Number of Tried Counts	Number of Count Acquittals	Acquittal Percentage
18 U.S.C. § 666(c)	Embezzlement involving federal programs	87	31	35.6%
18 U.S.C. § 1512(c) <sup>193</sup>	Obstruction / Presentation of a Falsified Document to the Court	84	31	36.9%

As well as the federal felonies with the lowest acquittal rates:

**Table VI: Low Acquittal Rates, Federal Felonies, 75+ Tried Counts  
FY 2003–FY2009<sup>194</sup>**

Code Section	Offense Description	Number of Tried Counts	Number of Acquittals	Acquittal Percentage
26 U.S.C. § 7203(d) <sup>195</sup>	Willful failure to file a tax return (felony)	91	4	4.4%
18 U.S.C. § 924(j)	Violent Crime / Drugs / Machine Gun / Where Death Occurs	89	5	5.6%
21 U.S.C. § 841(g)=CP <sup>196</sup>	Possession of a controlled substance (date-rape drugs) with intent to distribute	96	7	7.3%
18 U.S.C. § 2251 <sup>197</sup>	Sexual exploitation of children	106	9	8.5%

<sup>193</sup> Under this subsection of 18 U.S.C. § 1512, “Whoever corruptly—(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object’s integrity or availability for use in an official proceeding; or (2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.” The preceding provisions of 18 U.S.C. § 1512, which concern witness intimidation through force or violence (or the threat thereof), also featured high acquittal rates. The acquittal rate for charges under 18 U.S.C. § 1512(a) stood at 23.5 percent; the rate for charges under § 1512(b), at 34.4 percent. AOUSC Database, *supra* note 2.

<sup>194</sup> The table is derived from data in the AOUSC Database, *supra* note 2.

<sup>195</sup> Under this section of the Internal Revenue Code, failure to file a form relating a cash transaction of \$10,000 or more in the course of business is punishable as a felony. This crime is sometimes implicated in complex cases with a money-laundering component. *See Bickham-Lincoln-Mercury Inc. v. United States*, 168 F.3d 790, 793 (5th Cir. 1999) (describing the nature of reporting requirement implicated by section 7203’s felony provision).

<sup>196</sup> Subdivision (g) of 21 U.S.C. § 841 applies specifically to sales of “date-rape” drugs over the Internet. Under subdivision (g)(1), “Whoever knowingly uses the Internet to distribute a date rape drug to any person, knowing or with reasonable cause to believe that—(A) the drug would be used in the commission of criminal sexual conduct; or (B) the person is not an authorized purchaser; shall be fined under this subchapter or imprisoned not more than 20 years, or both.” 21 U.S.C. § 841(g)(1) (2006).



Code Section	Offense Description	Number of Tried Counts	Number of Acquittals	Acquittal Percentage
18 U.S.C. § 2113(d) <sup>198</sup>	Bank robbery / theft, ADW	135	12	8.9%
18 U.S.C. § 876 <sup>199</sup>	Mailing threats, ransom letters, etc.	86	8	9.3%
8 U.S.C. § 1326	Re-entry of a deported alien	534	51	9.6%
18 U.S.C. § 2252(a)	Sale, distribution, or possession of child pornography	379	39	10.3%
21 U.S.C. § 848 <sup>200</sup>	Continuing criminal enterprise	117	13	11.1%

Particularly when mapped against trial rates, this information indicates that substantial variation exists among crimes in their conduciveness to guilty verdicts at trial.<sup>201</sup> The data also help plea-bargaining dynamics come into better

---

<sup>197</sup> This crime applies to “any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in or affecting interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct,” assuming that a jurisdictional prerequisite is satisfied. 18 U.S.C. § 2251(a) (2006).

<sup>198</sup> Section 2113, subdivision (a) of Title 18 relates two somewhat distinct crimes. The first is essentially bank robbery; this crime applies to one who “by force and violence, or by intimidation,” or by extortion, takes or attempts to take property, money, or anything else of value from a bank or similar financial institution. The second of these offenses amounts to bank burglary; it creates the felony crime of entering or attempting to enter a bank or like establishment with the intent to commit therein any felony affecting the institution, or larceny. 18 U.S.C. § 2113(a). Subdivision (b) of the statute makes it a federal crime to “take[] and carr[y] away, with intent to steal or purloin, any property or money or any other thing of value . . . belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association.” Subdivision (d) of this statute, meanwhile provides that “[w]hoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both.” 18 U.S.C. § 2113 (2006).

<sup>199</sup> Section 876 of Title 18 makes it a federal crime to use the mails to send ransom letters or threatening communications. What is likely most commonly invoked provision of this statute relates, “Whoever knowingly so deposits [in any post office or authorized depository for mail matter] or causes to be delivered [by the Postal Service according to the direction thereon] . . . any communications with or without a name or designating mark subscribed thereto, addressed to any other person and containing . . . any threat to injure the person of the addressee or of another, shall be fined under this title or imprisoned not more than five years, or both.” 18 U.S.C. § 876 (2006).

<sup>200</sup> To prove a violation of 21 U.S.C. § 848, the government must establish that “(1) the defendant committed a felony violation of the federal narcotics laws, (2) the violation was part of a continuing series of violations, (3) the series of offenses occurred in concert with five or more persons, (4) the defendant was an organizer, supervisor, or manager, and (5) the defendant obtained substantial income or resources from the series of violations.” *United States v. Soto-Beníquez*, 356 F.3d 1, 25 (1st Cir. 2003).

<sup>201</sup> The high trial rates for 18 U.S.C. §§ 241 and 242 crimes indicate that their high acquittal rates are not the product of selection bias, *i.e.*, that only a very small subset of particularly weak

focus. The most frequently tried crime, 18 U.S.C. § 242, also happens to be the offense with the highest acquittal rate at trial. The third most frequently tried crime, 18 U.S.C. § 241, claims the second-highest acquittal rate. Meanwhile, embezzlement from a federal program (18 U.S.C. § 666(c)) also appears on both the list of most commonly tried crimes and the roster of crimes that most often lead to acquittal at trial; and presentation of a falsified document to a court (18 U.S.C. § 1512(c)) and aggravated sexual abuse (18 U.S.C. § 2241(a)), both of which appear on the latter list, fell just short of appearing on the list of most frequently tried charges.<sup>202</sup> At the other extreme, the 8 U.S.C. § 1326 series of offenses has among the highest conviction rates at trial, even accounting for the extremely low percentage of these cases that are put before a judge or jury.<sup>203</sup> It seems doubtful that these overlaps represent mere coincidences. On the contrary, these results suggest that, at least under the right conditions, trial outcomes *can* have a substantial impact of trial rates, and by inference, on plea bargaining.

These results also underscore the importance of code substance, together with code structure, in pushing cases toward trial. Aggravated assault, such as the crimes specified by 18 U.S.C. § 113(a) and (c), can be difficult to prove. These cases often entail situations in which the prosecution's witnesses were distracted, drunk, themselves complicit in wrongdoing, or are incapable of remembering matters clearly the time of trial. These concerns will lead prosecutors to reject many of these cases. Yet even in those cases that are filed, the outcome may turn on the credibility of the prosecution's witnesses. Here, a jury's assessment of a witness may not be the same as the prosecutor's. This disconnect, which may be inevitable *across* assault cases but is incapable of prediction in any *given* case, will produce a relatively large number of acquittals when these cases go to trial.

One might think that this dynamic would encourage prosecutors to plea-bargain. It might, but for the fact that the Federal Sentencing Guidelines for assault feature a sentencing "cliff." For a first offender, the Guidelines recommend a sentence of at least 70 months for assault with intent to murder;<sup>204</sup> for aggravated assault, a minimum term of at least 15 months is recommended.<sup>205</sup> Enhancements for use of a weapon in connection with the offense and the infliction of bodily injury upon the victim can increase these figures

---

cases are proceeding to trial. Compare the circumstances that surround charges of marijuana importation (21 U.S.C. § 952), discussed at the text accompanying notes 247–266, *infra*.

<sup>202</sup> Approximately 16 percent of all terminated 18 U.S.C. § 2241(a) counts within the database were resolved by way of trial. AOUSC Database, *supra* note 2.

<sup>203</sup> Overall, of the 98,201 termination counts that alleged a § 1326 charge, 88,370 related a conviction. This conviction percentage of 90 percent trails only 18 U.S.C. § 1028(a) and 18 U.S.C. § 4 (both of which claimed a conviction rate of approximately 92 percent) among crimes with 1,000 or more terminating counts within the AOUSC Database. AOUSC Database, *supra* note 2.

<sup>204</sup> U.S. SENTENCING GUIDELINES MANUAL § 2A2.1; Sentencing Table (2011).

<sup>205</sup> *Id.*, § 2A2.2; Sentencing Table.

substantially.<sup>206</sup> The Guideline for simple assault, by contrast, advises a sentence of zero to six months in custody.<sup>207</sup> Moreover, there is a significant symbolic loss to the prosecution in reducing a felony such as aggravated assault to a misdemeanor;<sup>208</sup> particularly when the victim suffered significant harm, prosecutors may balk at such a diminution of the charge. Given these considerations, a prosecutor in an aggravated assault case may regard a charge reduction to simple assault as giving up too much. The high odds of acquittal and lack of attractive plea options leads one to forecast that a relatively high percentage of counts alleging aggravated assault will go to trial. And this turns out to be true; 9.7 percent of § 113(a) counts and 9.2 percent of § 113(c) counts go to trial, as compared to the overall trial rate of 4.4 percent of all counts within the AOUSC Database.<sup>209</sup>

Even though the data, on their face, shed some light on trial and plea-bargaining decisions, they also contain some mysteries, such as why 18 U.S.C. § 924(j) has among the highest trial rates, when it also claims one of the lowest acquittal rates among federal offenses. The text below thus relates a series of “case studies” that more carefully consider the influences upon plea bargaining that surround individual crimes.

#### IV. CASE STUDIES

To gain a better appreciation about how the quirks of particular offenses may influence decision-making in criminal cases, this Part will consider the plea-bargaining patterns that surround specific offenses that appear in the tables above, and which either define the extremes of plea or trial practice, or exhibit interesting plea or trial patterns. Specifically, the text below will evaluate the plea and trial patterns that surround the crimes related at 18 U.S.C. § 242 (deprivation of civil

---

<sup>206</sup> The Sentencing Guidelines call for a three-level increase in base offense level if a dangerous weapon is brandished, or its use threatened, in commission of the offense; a four-level increase if the dangerous weapon was actually used, short of discharge of a firearm; and a five-level increase if a firearm is discharged in connection with the offense. *Id.*, § 2A2.2(b)(2). Enhancements for injuries to the victim begin with a three-level increase for bodily injury and escalate to a seven-level increase for permanent or life-threatening bodily injury. *Id.*, § 2A2.2(b)(3). These weapon and injury enhancements, put together, cannot increase the base offense level by more than ten levels. *Id.*

<sup>207</sup> 18 U.S.C. § 113(a)(4), (a)(5) (2006); U.S. SENTENCING GUIDELINES MANUAL § 2A2.3; Sentencing Table (2011).

<sup>208</sup> Wright & Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power*, *supra* note 19, at 1967 (noting the significance of the felony / misdemeanor distinction). Interestingly, Wright and Engen observe significant felony-to-misdemeanor charge movement among assault cases in their study of portions of the North Carolina code. *Id.* at 1960–61.

<sup>209</sup> AOUSC Database, *supra* note 2.

rights under color of law); 8 U.S.C. § 1326 (re-entry of a deported alien); 18 U.S.C. § 924(j) (use of a firearm in the commission of a federal felony, in which death occurs); 18 U.S.C. § 952 (importation of a narcotic or controlled substance; here, were are specifically concerned with the importation of marijuana); and 26 U.S.C. § 7201 (tax evasion).

#### A. 18 U.S.C. § 242 (Deprivation of Civil Rights Under Color of Law)

Section 242 charges implicate almost a “perfect storm” of factors that combine to push cases to trial: they are difficult to prove, they implicate a class of defendants with whom juries may empathize, they are relatively rare, they lack attractive plea-bargaining landing points, and there exists political pressure to bring these cases, such that, even granting rigorous screening by the Department of Justice, prosecutors file and try a relatively large percentage of cases with a substantial likelihood of acquittal.

Section 242 is a civil-rights crime.<sup>210</sup> It provides that “Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens,” is guilty of a felony.<sup>211</sup> Many § 242 cases are brought against law-enforcement officers.<sup>212</sup> The charges in these matters frequently allege that the defendant or defendants used excessive force.<sup>213</sup>

Proving these charges beyond a reasonable doubt can be difficult.<sup>214</sup> Section 242 has been construed as requiring a specific intent to deprive an

---

<sup>210</sup> The story surrounding the enactment 18 U.S.C. § 242 is described in Edward F. Malone, *Legacy of the Reconstruction: The Vagueness of the Criminal Civil Rights Statutes*, 38 UCLA L. REV. 163, 171–79 (1990). For a history of prosecutions under § 242, see generally James P. Turner, *Police Accountability in the Federal System*, 30 MCGEORGE L. REV. 991 (1999).

<sup>211</sup> 18 U.S.C. § 242 (2006).

<sup>212</sup> Brian R. Johnson and Phillip B. Bridgmon, *Depriving Civil Rights: An Exploration of 18 U.S.C. 242 Criminal Prosecutions 2001–2006*, 34 CRIM. JUST. REV. 196, 198 (2009) (“Section 242 is aimed at public officers who abuse the constitutional or statutory rights of others”); Steven Puro, *Federal Responsibility for Police Accountability Through Criminal Prosecution*, 22 ST. LOUIS U. PUB. L. REV. 95, 106–11 (2003) (relating data on federal prosecutions under § 242 from 1985 to 2011).

<sup>213</sup> *Reform of the Federal Criminal Laws: Hearing Before the Subcommittee on Criminal Laws and Procedures of the Committee on the Judiciary, United States Senate*, 93rd Cong. 6777 (1973) (statement of K. William O’Connor, Deputy Assistant Att’y Gen., Civil Rights Division, Department of Justice) (hereinafter “*Reform of the Federal Criminal Laws—O’Connor Statement*”).

<sup>214</sup> See Seth Mydans, *Tough Task Ahead in Beating Trial*, N.Y. TIMES, Aug. 24, 1992, at A8 (describing official-misconduct civil-rights charges as difficult to prove). These problems are of

individual of his or her civil rights, as opposed to merely a general intent to commit an act that leads to injury.<sup>215</sup> This element presents at least two difficulties for the prosecution, even in the best of cases. First, it can be difficult to communicate what this element actually means, and how it maps against the evidence.<sup>216</sup> Second, the evidence that the prosecution relies upon to show intent in these cases may be ambiguous, or susceptible to impeachment or rebuttal.<sup>217</sup> In addition, to the extent that § 242 cases typically involve police officers, juries have been known to nullify their instructions even when, objectively, guilt has been established beyond a reasonable doubt.<sup>218</sup> Here, the personalities of the defendants and victims may loom large; as the Civil Rights Division of the Department of Justice has explained, “The victims of most official misconduct cases tend to be unsympathetic while the defendants often are well respected members of the community.”<sup>219</sup>

These issues collude to produce high acquittal rates at trial. The data in Part III show an acquittal rate of more than 50 percent for § 242 counts tried

---

longstanding vintage. *See, e.g., 2 Ex-Cops Win Acquittal in Beating Trial*, CHICAGO TRIBUNE, Apr. 24, 1954, at 7 (relating the acquittal of two police officers in a federal civil-rights case).

<sup>215</sup> *Screws v. United States*, 325 U.S. 91, 104 (1945). *See also* Michael J. Pastor, *A Tragedy and a Crime? Amadou Diallo, Specific Intent, and the Federal Prosecution of Civil Rights Violations*, 6 N.Y.U. J. LEGIS. & PUB. POL’Y 171, 176–84 (2002) (discussing the intent element and how lower courts have construed it).

<sup>216</sup> Turner, *supra* note 210, at 1001 (observing that specific intent “has remained a troubling element of proof for prosecutors to meet” in these cases). *See also* John Frank, *City Rarely Prosecutes Civil Rights Complaints*, HOUSTON CHRON., Dec. 1, 2004, at A1 (“Justice Department officials have said that civil rights cases against law enforcement officers are difficult to prosecute because of problems with the interpretation and perception of the law against civil rights abuses carried out ‘under the color of law.’”).

<sup>217</sup> *See* Steven Puro, *Federal Responsibility for Police Accountability Through Criminal Prosecution*, 22 ST. LOUIS U. PUB. L. REV. 95, 102 (2003) (observing that in section 241 and 242 cases, “major difficulties for prosecutorial success [include] standards of proof [and] juries’ willingness to believe the police and the justification for their activities.”); Mydans, *supra* note 214 (describing “the difficulty of proving criminal intent” as “one main reason” why official-misconduct criminal rights cases are difficult to prove); *Reform of the Federal Criminal Laws*, *supra* note 213, at 6774 (opining that the jury instructions in section 242 cases “which require the government to prove that the defendant acted with the specific intent to deprive the victim of a constitutional right” help explain the low acquittal rate in these matters). *See also* Frank, *supra* note 216 (“Justice Department officials have said that civil rights cases against law enforcement officers are difficult to prosecute because of problems with the interpretation and perception of the law against civil rights abuses carried out ‘under the color of law.’”).

<sup>218</sup> Turner, *supra* note 210, at 1109 (noting that “Jury nullification occurs in too many [section 242] cases.”)

<sup>219</sup> *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1998, Hearings Before a Subcommittee of the Committee on Appropriations, House of Representatives, Part 2: Justification of Budget Estimates*, 105th Cong. 482 (1997).

within the FY2003–FY2009 case-termination period.<sup>220</sup> This figure comports with an earlier study of official-misconduct cases tried between 1985 and 2001, which found that “[o]nce the Criminal Section brought a [section 242] law enforcement case to trial, there was substantial difficulty in obtaining a conviction.”<sup>221</sup> Specifically, over this span, “there were 254 convictions and 225 acquittals, an average of 15 convictions and 13 acquittals per year.”<sup>222</sup> If anything, these cases have been getting *easier* to prove; reports of prosecutions during the 1970s and 1960s reveal even higher acquittal rates.<sup>223</sup>

Once again, one might expect that these impediments would be anticipated by prosecutors, and lead to the extensive screening of these cases. And this expectation would be correct; statistics show a much lower filing rate for § 242 cases referred for potential prosecution than for other types of offenses.<sup>224</sup> Even with this rigorous screening, however, § 242 cases produce high acquittal rates. The reasons are likely threefold: political pressures may lead to the filing of official-misconduct civil-rights cases even when there exists a relatively high

---

<sup>220</sup> Within the universe of cases within the AOUSC Database that involved at least one tried section 242 count, if one removes these § 242 charges from these cases, the acquittal rate at trial for the remaining charges drops to 40.3 percent. If one also removes counts under 18 U.S.C. § 241 from these matters, the acquittal rate drops to 32.7 percent. AOUSC Database, *supra* note 2.

<sup>221</sup> Puro, *supra* note 217, at 113.

<sup>222</sup> *Id.* Johnson and Bridgmon, *supra* note 212, found that only 21 out of the 186 section 242 cases filed between 2001 and 2006 led to acquittals. *Id.* at 202. Though the author has neither confirmed nor refuted this finding, these data are not necessarily inconsistent with Puro’s findings of a high acquittal rate, or the data in the AOUSC Database. Even acknowledging the high trial rate associated with § 242 charges, more of these cases produce guilty pleas than go to trial. Within the subset of cases that go to trial, a given case may involve an acquittal on one count and a conviction on another. Johnson and Bridgmon appear to count this result as a conviction, whereas the AOUSC Database records both the conviction counts and acquittal counts.

<sup>223</sup> *Reform of the Federal Criminal Laws—O’Connor Statement*, *supra* note 213, at 6774 (observing that during fiscal year 1973, of the 52 police-officer defendants whose § 242 cases involved the alleged use of excessive force, four had their cases dismissed at the government’s motion, four pleaded guilty, 44 were tried, and only nine of these 44 were convicted—and noting this 25 percent overall conviction rate represented a significant *increase* from the conviction rate in similar cases in prior years); *Reform of the Federal Criminal Laws: Hearing Before the Subcommittee on Criminal Laws and Procedures of the Committee on the Judiciary, United States Senate*, 93rd Cong. 3160 (1972) (statement of Burke Marshall) (reporting that of the 78 section 242 cases brought by the Department of Justice since January 1, 1970, 67 had gone to trial, leading to convictions in only 12 of these cases, with only five convictions by jury). These acquittals were not just the products of jury nullification; in one high-profile section 242 case—the prosecution of the National Guardsmen who shot antiwar protesters at Kent State University in 1970—the trial court granted a defense motion to dismiss for insufficient evidence at the close of the prosecution’s case. JAMES P. TURNER, *THE OTHER SIDE OF THE MOUNTAIN: AN AUTOBIOGRAPHY* 246–47 (2008).

<sup>224</sup> TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, UNDER COLOR OF LAW (December 1, 2004), available at <http://www.trac.syr.edu/tracreports/civright/107/>.

likelihood of acquittal,<sup>225</sup> prosecutors may not fully account for juror reluctance to convict public officials of a crime, and once a § 242 case is filed, there exist few attractive plea-bargaining options for the parties.<sup>226</sup>

As to the last of these factors, while other types of cases may claim attractive plea-bargaining “landing points,” there are few such alternatives with § 242 charges.<sup>227</sup> In § 242 cases that involve excessive force (as many do), possible compromise offenses might include simple or aggravated assault. But federal courts lack jurisdiction over basic assault crimes except in rare cases, mostly involving admiralty or territorial jurisdiction (such as assaults that occur on military bases). In any event, from the prosecution’s perspective, to compromise away the civil-rights component of these cases would essentially abandon the federal interest in prosecution. Sentence bargains, in which the defendant receives a modest term of incarceration in exchange for a guilty plea, are equally unlikely given the notoriety of, and political pressures that surround, many § 242 cases. In this environment, few prosecutors will accede to the steep concessions that defendants (cognizant of the high odds of acquittal) will demand. And so, many of these cases will proceed to trial.

#### **B. 8 U.S.C. § 1326 (Re-entry of a Deported Alien)**

Unlike counts under 18 U.S.C. § 242, charges brought under 8 U.S.C. § 1326 (re-entry by a deported alien) rarely go to trial. Moreover, as evidenced by the high integrity rate of § 1326 charges, cases that allege this crime as the lead count rarely produce charge bargains in which this count is replaced with another, lesser charge. Instead, defendants tend to “plead to the sheet” in these matters.

The prevalence of pleas to § 1326 counts, without any dismissal or reduction in charges, seems easy to explain. For starters, as discussed in Part II<sup>228</sup>

---

<sup>225</sup> See Frank, *supra* note 216 (observing that section 242 cases are infrequent, high-profile matters). Well-publicized section 242 cases in recent memory include the prosecutions of the Los Angeles Police Department officers who assaulted Rodney King, *see United States v. Stacey C. Koon*, 7 FED. SENT. REP. 205, 205 (1995), and the prosecution of New York police officers who assaulted Abner Louima in 1997, *see United States v. Schwarz*, 259 F.3d 59, 59 (2d Cir. 2001).

<sup>226</sup> See Joseph Fried, *Plea Deal Said to Be Rejected in Louima Trial*, N.Y. TIMES, May 22, 1999, at A1 (relating the prosecution’s rejection of a plea-bargain offer made by a defendant in a section 242 case).

<sup>227</sup> Review of the most serious terminating charges in plea-bargained cases where the original “most serious” charge had been a § 242 count illustrates the relative dearth of “landing points” for plea bargains in cases that allege these crimes. These 114 cases ultimately produced only nine different most serious terminating offenses, even if one counts § 242 twice (as both a felony and a misdemeanor); a felony § 242 charge was the most serious terminating offense in 90 of these cases (or 78.9 percent). For purposes of comparison, 18 U.S.C. § 1519 was the most serious charging offense in 145 cases, yet these cases resulted in 31 different most serious terminating offenses, with the § 1519 charge representing the most serious terminating offense in only 62 of these matters (or 42.8 percent). AOUSC Database, *supra* note 2.

<sup>228</sup> See text accompanying notes 73–77, *supra*.



and confirmed by the data presented in Part III,<sup>229</sup> § 1326 charges are simple to prove. As a result, prosecutors perceive no real need to bargain, and virtually all defendants regard the two- or three-level reduction in base offense level for their early acceptance of responsibility<sup>230</sup> as representing a far better outcome than the one they are likely to obtain from taking their case to trial. (Or, better yet, a defendant may receive up to a four-level reduction pursuant to “fast track” early disposition proceedings, as are authorized in some districts where these cases are prevalent.<sup>231</sup>) Meanwhile, the crime is not one where prosecutors will demand the maximum possible penalty, such that they, too, are amenable to the sentencing discounts that are available through these routes.

Other relevant circumstances also encourage the early entry of pleas to § 1326 counts. Even if this crime was difficult to establish, it lacks attractive alternative charges for plea-bargain “landing spots.”<sup>232</sup> Furthermore, § 1326 counts are only rarely charged together with additional crimes that, being more

---

<sup>229</sup> See text accompanying the tables at notes 161 and 182, *supra*.

<sup>230</sup> U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2011).

<sup>231</sup> *Id.*, § 5K3.1 (“Upon motion of the Government, the court may depart downward not more than 4 levels pursuant to an early disposition program authorized by the Attorney General of the United States and the United States Attorney for the district in which the court resides.”) “Fast-track programs allow a prosecutor to offer a defendant a reduced sentence in exchange for the defendant entering into a boilerplate plea agreement within a short period of time after indictment. These programs are typically used for immigration and drug-smuggling offenses.” Evan W. Bolla, *An Unwanted Disparity: Granting Fast-Track Departures in Non-Fast-Track Districts*, 28 CARDOZO L. REV. 895, 896 (2006). Only certain districts have received approval for fast-track proceedings, and these proceedings are limited to crimes that appear in such large volumes in those districts that the abbreviated proceedings will conserve significant resources. A list of the districts that offered “fast track” dispositions as of 2008, and the types of crimes eligible for these proceedings in these districts, can be found at Craig Morford, Acting Deputy Attorney General, to United States Attorneys for the following Districts: Arizona, Central District of California, Eastern District of California, Northern District of California, Southern District of California, Middle District of Florida, Southern District of Florida, Northern District of Georgia, Idaho, Kansas, Nebraska, New Mexico, Eastern District of New York, North Dakota, Oregon, Puerto Rico, Southern District of Texas, Western District of Texas, Utah, Eastern District of Washington, and Western District of Washington (Feb. 1, 2008) (on file with author), *available at* [http://www.fd.org/pdf\\_lib/fast\\_track\\_reauthorization08.pdf](http://www.fd.org/pdf_lib/fast_track_reauthorization08.pdf) (hereinafter “Morford Letter”). Where fast-track proceedings are available, a large percentage of section 1326 pleas tend to involve fast-track pleas. See, e.g., United States of America v. Krukowski, No. 04-CR-1308 (LAK), Government’s Memorandum of Law in Opposition to the Defendant’s Motion for a Non-Guidelines Sentence Based on the Existence of Fast-Track Programs, at 10 (observing that in 2004, the Southern District of California processed 1,878 section 1326 cases, with 1,388 of these cases resolving through fast-track guilty pleas.).

<sup>232</sup> Section 1326 charges were rarely replaced as the most serious offense in a case that resolved by plea. Only two other crimes (8 U.S.C. § 1325 (in 1,014 cases) and 18 U.S.C. § 1001 (in 108 cases)) supplanted section 1326 as the lead charge in more than 50 pled-out cases over the studied time span, and overall, cases in which section 1326 represented the most serious initial charge produced only 22 other most serious terminating charges (disregarding misdemeanor variations of felony offenses already accounted for)—a very low figure, in light of the enormous volume of section 1326 cases.



hotly contested, may drag a § 1326 count into trial.<sup>233</sup> And the substantial volume of § 1326 cases leads to consistent plea expectations among both prosecutors and the defense. The result is a crime at the opposite end of the spectrum from the 18 U.S.C. § 242 offense—one that produces very few trials, and very few acquittals even in this limited universe of tried cases.<sup>234</sup>

The extremely low trial rates in § 1326 cases raise another, more sensitive point. This article is not about race. But issues of race and ethnicity are bound up in its claim that commoditized crimes are more subject to pleas than other offenses are, and that the identity of the defendants associated with a crime may affect the extent to which the offense lends itself to commoditization. This argument implies that the more the outcome of a case hinges on idiosyncratic case characteristics, the less likely it becomes that the parties will be to agree on the terms of a plea bargain. At the other pole, if a crime contributes to the commoditization of its defendants, it will lead to more pleas, and fewer trials. Given its simple construction, § 1326 does not accommodate individual narratives regarding a defendant's reasons for re-entry. Nevertheless, one might wonder whether the high plea rates of the defendant class implicated by § 1326 results, at least in part, from the fact that these defendants disproportionately lack the means to develop these individualized narratives, or an audience receptive to these explanations.

### **C. 18 U.S.C. § 924(j) (Use of a Firearm in the Commission of a Federal Felony, Resulting in Death)**

It is easy to understand how the character of, and circumstances surrounding, 18 U.S.C. § 242 tends to produce both acquittals and trials, and why 8 U.S.C. § 1326 has the opposite profile of low acquittal rates, and few trials. By comparison, the data surrounding 18 U.S.C. § 924(j) presents a bit of a mystery.

This crime is dismissed pursuant to plea deals more often than almost any other federal felony.<sup>235</sup> At the same time, this charge is also taken to trial

---

<sup>233</sup> Within the aggregate dataset, almost 90 percent (89.3%) of all cases in which the initial charging document included a § 1326 charge alleged only that one single count, and no others. For purposes of comparison, across the database as a whole, 52.1 percent of cases (325,093/623,430) involved only a single initial charged count; 24.4 percent (152,173/623,430) involved two charged counts; 9.7 percent (60,227/623,430) involved three charged counts, 5.6 percent (35,136/623,430) involved four charged counts, and 8.1 percent (50,801/623,430) involved five or more charged counts.

<sup>234</sup> The fact that almost 90 percent of all § 1326 counts during the studied time period ultimately resulted in convictions also underscores the nature of this crime as an almost foolproof allegation for the prosecution. Only two frequently alleged crimes had higher overall conviction rates, on a count-specific basis: 18 U.S.C. § 1028(a) and 18 U.S.C. § 4. AOUSC Database, *supra* note 2.

<sup>235</sup> See text accompanying note 152, *supra*.

relatively often—where it almost invariably leads to a conviction.<sup>236</sup> These figures present at least two questions: Why are prosecutors so willing to dismiss these charges? And why do a relatively large number of these cases go to trial, given the low odds of acquittal?

The answer to these questions begins with the language of § 924(j), which provides:

a person who, in the course of a violation of subsection (c) [use of a firearm in the commission of a federal drug crime or violent felony], causes the death of a person through the use of a firearm, shall—(1) if the killing is a murder (as defined in section 1111) be punished by death or by imprisonment for any term of years or for life; and (2) if the killing is manslaughter (as defined in section 1112), be punished as provided in that section.

Thus, “[t]here are four elements that the Government must prove in order to sustain a violation of § 924(j): 1) the commission of a federal crime of violence or drug trafficking; 2) the use or carrying of a firearm during or in furtherance of such a crime; 3) the death of person by the use of the firearm; and 4) the death was caused by murder [or manslaughter] as defined in 18 U.S.C. § 1111 [or § 1112].”<sup>237</sup> Significantly, most courts hold that the punishment prescribed by section 924(j) is cumulative to any sentence imposed for the predicate felony, or felonies.<sup>238</sup>

The composition of this crime and its relationship to other offenses go a long way toward explaining why § 924(j) charges are frequently dismissed pursuant to plea bargains. Like several other “charging crimes,” § 924(j) presumes the existence of another serious felony charge, which may be alleged alongside the § 924(j) count and serve as the basis for the bargain. There are many such related offenses—from racketeering crimes to drug offenses to the use of violence against a prospective witness—and these crimes create an array of possible sentencing “landing points” for plea bargains. In all, cases terminating in a plea in which a count under 18 U.S.C. § 924(j) represented the most serious initial charge ultimately led to 31 different most serious terminating charges.<sup>239</sup>

---

<sup>236</sup> As evidences by the data in Table VI in Part III, *supra*. High dismissal rates are consistent with high trial rates given how few federal criminal cases actually go to trial. As related earlier in this article, over the studied time period, no commonly charged crime saw trials on more than 30.1 percent of alleged counts.

<sup>237</sup> *United States v. Winston*, 55 Fed. Appx. 289, 300 (6th Cir. 2003).

<sup>238</sup> E.g., *United States v. Battle*, 289 F.3d 661 (10th Cir. 2002). *Compare* *United States v. Julian*, 633 F.3d 1250 (11th Cir. 2011) (holding that lies was within district court’s discretion to impose a concurrent sentence for a 18 U.S.C. § 924(j) conviction).

<sup>239</sup> AOUSC Database, *supra* note 2.

At the same time, the gravamen and consequences of a § 924(j) charge, and the environments in which it operates, encourage trials in cases where the defendant was closely involved in a homicide—a scenario that ups the stakes for the prosecution and the defense. In a substantial share of these cases, the § 924(j) count is the closest thing a federal prosecutor has available to a murder charge (since there is no general federal jurisdiction for murder). And as previously discussed,<sup>240</sup> prosecutors are loath (relatively speaking) to dismiss murder charges and inclined to take them to trial. Section 924(j) cases also tend to require significant investments of time and effort by the prosecution; this commitment of resources, together with the notoriety that often attaches to these proceedings, may make prosecutors less interested in plea concessions.<sup>241</sup>

From the defense perspective, these cases contain other recurring attributes that encourage defendants to demand trials. As previously mentioned, a trial on the § 924(j) count is a given if prosecutors refuse to take the death penalty off the table.<sup>242</sup> In other cases, the presence of several overlapping charges, as tend to appear in these matters, may mean that a defendant faces so much potential custody time with or without a plea deal to the § 924(j) count that he will opt to roll the dice at trial.<sup>243</sup> Viewed prospectively, a defendant may not glean substantial value in a plea offer of 30-year sentence, instead of a 40-year term; either way, freedom remains decades down the road.<sup>244</sup> Perhaps equally important, these charges often appear in connection with gang or organized crime activity, as to which special deterrents may exist to the entry of a guilty plea. In these cases, a defendant may be concerned that his confederates will consider such a plea as a betrayal, and seek revenge.

---

<sup>240</sup> See text accompanying note 108, *supra*.

<sup>241</sup> See Margareth Etienne & Jennifer K. Robbennolt, *Apologies and Plea Bargaining*, 91 MARQ. L. REV. 295, 319 (2007) (observing that “[t]he psychological effects of . . . sunk costs, which make it difficult for civil claimants to abandon their efforts, may make it difficult for victims and prosecutors to do so as well”).

<sup>242</sup> While there normally exists no outright bar to such a plea, see Anthony J. Casey, *Maintaining the Integrity of Death: An Argument for Restricting a Defendant’s Right to Volunteer for Execution at Certain Stages of Capital Proceedings*, 30 AM. J. CRIM. L. 75, 92–93 (2002) (noting that only Arkansas and New York have outright bans on guilty pleas to a capital crime, as to which the death penalty may represent a consequence of the plea), “a case in which a death sentence was imposed is virtually certain to have gone to trial—not many lawyers are reckless enough to advise clients to plead guilty to capital murder without an agreement or understanding that doing so will avoid the death penalty.” James P. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2108 (2000).

<sup>243</sup> Cases in which § 924(j) charges appear typically involve numerous other charges, in addition to the §924(j) count. The dataset identifies initial charging documents as alleging a § 924(j) count in 345 cases (this likely undercounts the total number of cases that commenced with a § 924(j) count, since they may have represented, the six, seventh, or higher count in some cases). Of these matters, 263, or 76.2 percent, involved at least five charged counts. AOUSC Database, *supra* note 2.

<sup>244</sup> See Easterbrook, *supra* note 24, at 295, 312–16 (discussing how defendants discount future incarceration, relative to imminent custody).

The data underscore the high stakes that many of these cases involve. In 181 of the 367 cases in the AOUSC Database that included a § 924(j) charge, the defendant ultimately received a prison sentence of at least 30 years. In the subset of § 924(j) cases that went to trial and produced a guilty verdict on at least one count, 90 percent (111 out of 124) led to prison sentences of at least 30 years. More tellingly, across all tried § 924(j) cases, there was an acquittal rate of only five percent as to *all* crimes, not just those under § 924(j). All in all, it appears that this when this crime goes to trial, the stakes may be so high for the defendant,<sup>245</sup> and the prosecution so reluctant to offer significant concessions, that trial represents the defense’s only real strategic option—notwithstanding the low odds of acquittal.

#### **D. 21 U.S.C. § 952 (Importation of Marijuana)**

Another mystery presented by the data concerns the relative rarity of tried 21 U.S.C. § 952 counts that allege the importation of marijuana, as juxtaposed against the relatively high acquittal rate in these matters.<sup>246</sup> Just 1.2 percent of 21 U.S.C. § 952 counts that allege marijuana importation go to trial.<sup>247</sup> These counts yield an acquittal rate of 37.6 percent (with 118 out of 189 tried counts leading to convictions), which is almost twice the database average across all counts.<sup>248</sup> Particularly given the mandatory minimum sentences that adhere to federal drug crimes—which suggest that the high plea rate results from something other than extremely generous sentence offers by prosecutors—this disconnect poses the question of whether the high acquittal rate results from a particularly potent selection-bias effect, whereby only especially weak § 952 marijuana cases go to trial.

The data suggest an affirmative response to this question. First, the data reveal that these cases tend not to involve much “charge stacking” by the prosecution. Between FY 2003 and FY 2009, 15,351 cases alleged at least one marijuana-importation count under 21 U.S.C. § 952 at the time of initial filing.<sup>249</sup> Seventy-nine percent of these cases were simple one- or two-count matters.<sup>250</sup> In

---

<sup>245</sup> Elder, *supra* note 34, at 199 (finding, per a regression analysis, that factors that “increase the stakes” of a case, such as the use of a weapon in the commission of a crime, or harm or death to the victim, reduce the likelihood of a plea bargain).

<sup>246</sup> The AOUSC Database divides marijuana-importation counts among three codes (21:952=MI.F; 21:952A=MI.F; and 21:952B=MI.F). One of these codes (21:952B=MI.F) accounted for very few charges; the other two exhibited very similar patterns.

<sup>247</sup> AOUSC Database, *supra* note 2.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Id.* Across the seven-year period studied, 4,115 section 952 marijuana cases (27%) alleged only a single count; 7,993 (52%) alleged two counts; 685 (4%) alleged three counts; 2,146

§ 952 cases that alleged only one other count, more than 90 percent of the time, the second count alleged possession of marijuana with an intent to sell or distribute (21 U.S.C. § 841) or conspiracy to distribute marijuana (21 U.S.C. § 846)—logical charges to join with an importation count, at least when more than a small amount of marijuana is involved. (When these matters are resolved by plea, one or another of these two charges is commonly dismissed;<sup>251</sup> and in any event, the two charges may represent “closely related counts” under the Federal Sentencing Guidelines, such that the second charge does not threaten significant additional punishment.<sup>252</sup>)

Second, most of these cases are simple to prove, and there exist powerful inducements for a resolution by way of a guilty plea.<sup>253</sup> Of the 15,383 cases in which a section 952 marijuana-importation charge appeared at the time of case termination, only 5.7 percent did not result in a conviction.<sup>254</sup> By way of comparison, across the AOUSC database as a whole, only 89.5 percent of cases resulted in convictions.<sup>255</sup> Furthermore, due to their concentration within a few judicial districts (discussed below), these cases tend to be eligible for “fast track” proceedings, which encourage early defense pleas by offering defendants up to a four-level base offense level reduction.<sup>256</sup> The availability of this downward departure for early pleas contributes to a substantial sentencing differential between plea-bargained dispositions and dispositions by trial: the median post-conviction prison term in § 952 marijuana-importation matters that resolved by plea was only 15 months,<sup>257</sup> but spiked upward in tried cases, to 33 months.<sup>258</sup>

---

(14%) alleged four counts, and 412 (3%) alleged five or more counts. AOUSC Database, *supra* note 2.

<sup>251</sup> *Id.*, *supra* note 2 (reflecting dismissals as to the second count in more than 80 percent of terminated, two-count 21 U.S.C. § 952 marijuana-importation proceedings).

<sup>252</sup> See U.S. SENTENCING GUIDELINES §§ 3D1.1, 3D1.2 (2011) (discussing the “grouping” of, *inter alia*, certain factually related drug crimes for purposes of determining the applicable sentence)

<sup>253</sup> *But cf.* Testimony of Steven F. Hubachek and Shereen J. Charlick, Supervisory Attorneys of Federal Defenders of San Diego, Inc., before the United States Sentencing Commission Concerning Fast Track or Early Disposition Programs 6 (Sept. 23, 2003) (on file with author), available

at [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Public\\_Hearings\\_and\\_Meetings/20030923/hubachek.pdf](http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20030923/hubachek.pdf) (hereinafter “Hubachek Testimony”) (discussing triable issues regarding the defendant’s knowledge, or lack thereof, that sometimes appear in § 952 cases, and describing the knowledge element as “often difficult to demonstrate”).

<sup>254</sup> AOUSC Database, *supra* note 2.

<sup>255</sup> *Id.*

<sup>256</sup> Morford Letter, *supra* note 231 (reauthorizing “fast track” proceedings for drug-importation cases arising in the Southern District of California, the Western District of Texas, the District of Arizona, and the Laredo division of the Southern District of Texas). See also Hubachek Testimony, *supra* note 253 (discussing the use of fast-track proceedings within the Southern District of California in cases brought under 21 U.S.C. § 952).

<sup>257</sup> *Id.*

Third, and finally, § 952 cases are concentrated within a few jurisdictions. Between them, the Western District of Texas and the Southern District of California accounted for more than 85 percent of all terminated § 952 matters within the aggregate dataset (13,105/15,383).<sup>259</sup> Four districts—the two just mentioned, together with the Southern District of Texas and the District of Arizona—account for more than 95 percent of these cases (14,664/15,383).<sup>260</sup>

These conditions—simple cases, recurring charges, low stakes but a trial penalty for the defense, and concentration of many cases within a few jurisdictions—suggest that there will be a high percentage of pleas in § 952 cases, and attorneys who are well positioned to spot the handful of cases in which a defense may be viable.<sup>261</sup> And if one looks at the trial data, it becomes apparent that the § 952 charges that do go to trial arise in a handful of relatively weak cases. The acquittal rate for marijuana-importation charges under 21 U.S.C. § 952 is, as stated previously, 37.6 percent.<sup>262</sup> Tellingly, the acquittal rate for all *other* charges in these cases is not far behind, at 37.4 percent.<sup>263</sup> Crimes that normally yield convictions at trial suddenly become acquittal-prone within this narrow universe of tried cases. For example, the overall acquittal rate at trial for charges under 21 U.S.C. § 841(a), alleging possession of marijuana for sale or distribution, is 24.8 percent.<sup>264</sup> In tried cases that allege a § 952 count, this figure soars to 34.6 percent.<sup>265</sup>

The foregoing analysis suggests that the low trial and high acquittal rates for § 952 marijuana charges likely result from sophisticated case evaluation by defense attorneys. The attorneys within the handful of jurisdictions that entertain a large number of § 952 cases see enough of these matters to develop a sense as to which cases are worth taking to trial. Not many are. Yet a select few do pass this

---

<sup>258</sup> Because the penalties in these cases are tied to the amount of drugs involved, one can hypothesize that most importation cases involve moderate quantities of the drug. The Sentencing Guidelines prescribe a 33-month term for possession of at least 40, but less than 60 kilograms of marijuana. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1; Sentencing Table (2011).

<sup>259</sup> AOUSC Database, *supra* note 2.

<sup>260</sup> *Id.*

<sup>261</sup> Most likely, these defenses involve an allegedly insufficient connection between the defendant and the marijuana. “In order to obtain a conviction for importation of marijuana under 21 U.S.C. §§ 952 and 960, the government must prove that the defendant (1) intentionally brought the marijuana into the United States; and (2) knew that it was a controlled substance.” U.S. v. Moytez-Pineda, 312 Fed. Appx. 859, 861 (9th Cir. 2009). When importation in a vehicle is involved, “a passenger [in a vehicle containing contraband] may not be convicted [of drug offenses] unless there is evidence connecting him with the contraband, other than his presence in the vehicle. [Citation.]” *Id.* Specifically, “The government must show that the defendant has knowledge of the presence of the drugs and ‘the power to exercise dominion and control over it.’ [Citation.]” *Id.* at 861–62.

<sup>262</sup> AOUSC Database, *supra* note 2.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

test. With this limited universe of cases, many likely involve disputes over the defendant's intent to import the marijuana.<sup>266</sup> Under the circumstances, the defendant is either guilty of importation and possession with the intent to sell or distribute, or of no crime at all. The prosecution subscribes to the former point of view, the defense, the latter. Few possible charge bargains exist in these cases, and barring a sentence bargain (which may be difficult, given mandatory minimum sentences) these matters will proceed to trial, even if there exists a high likelihood of acquittal.

#### **E. 26 U.S.C § 7201 (Tax Evasion)**

Finally, some offenses may ensnare a relatively high percentage of defendants who will refuse to enter a plea under almost any circumstances, no matter how generous the proffered terms are. Some of these defendants may insist on trials because of something that oversimplified applications of the rational-actor model do not fully account for: principle.

The data that surrounds plea and trial rates for tax crimes suggests that some defendants in these cases are true believers who will refuse to accept plea bargains that a “rational” defendant would eagerly embrace.<sup>267</sup> As mentioned at the outset of this article, charges of felony tax evasion (26 U.S.C. § 7201) go to trial approximately three times as often as the dataset average (12.2 percent of these counts are tried, as compared to 4.4 percent for the database as a whole),<sup>268</sup> even as the acquittal rate for these charges (13.8 percent) is significantly lower than the average for all crimes.<sup>269</sup> Unlike charges under 18 U.S.C. § 924(j), this

---

<sup>266</sup> *E.g.*, *United States v. Ramirez*, 176 F.3d 1179, 1181 (9th Cir. 1999) (observing that “mere knowledge of the presence of contraband, without evidence suggesting a passenger's dominion or control of the contraband, is insufficient to prove possession,” and reversing a defendant's conviction of importation of marijuana on insufficient-evidence grounds).

<sup>267</sup> The Internal Revenue Service has dedicated a publication to debunking “frivolous” tax arguments. INTERNAL REVENUE SERVICE, THE TRUTH ABOUT FRIVOLOUS TAX ARGUMENTS (2011), [http://www.irs.gov/pub/irs-utl/friv\\_tax.pdf](http://www.irs.gov/pub/irs-utl/friv_tax.pdf). See also United States Department of Justice, Nathan J. Hochman, Tax Division's Assistant Attorney General, Announces the Creation of the National Tax Defier Initiative (April 8, 2008), <http://www.justice.gov/opa/pr/2008/April/08-tax-275.html> (announcing stepped-up enforcement of the tax laws as against “tax defiers,” defined as “someone who rejects the legal foundation of the tax system, despite decades of legal precedent upholding the system's constitutional and statutory validity, and who takes specific and concrete action to violate the law.”).

<sup>268</sup> AOUSC Database, *supra* note 2.

<sup>269</sup> *Id.* Likewise, the tax crimes related at 26 U.S.C. § 7202 and § 7203 (as a misdemeanor and as a felony) exhibit lower acquittal rates (7.4, 8.5, and 4.4 percent, respectively), than the overall database average, but higher trial rates (8.9, 6.0, and 16.6 percent) than the database as a whole. AOUSC Database, *supra* note 2. As to one of these offenses (26 U.S.C. § 7203, charged as a felony, which reflects the willful failure to file the proper IRS form upon receipt of \$10,000 or more in cash as part of a business transaction) this pattern likely owes in part to its use as a money-laundering count in complex, high-stakes criminal prosecutions that are prone to trials. See *Bickham-Lincoln-Mercury Inc. v. United States*, 168 F.3d 790, 793 (5th Cir. 1999) (describing the

disparity cannot be explained by reference to any particularly severe consequences of conviction; sentences for tax evasion are rarely more than a few years, unless the defendant is a repeat offender or the evaded taxes are massive.<sup>270</sup>

Some of these trials may occur because, for well-heeled defendants, the stigma that attaches to *any* conviction—by plea or by trial—may represent a particularly large component of the punishment that attaches to the offense.<sup>271</sup> Other defendants in tax-evasion cases, meanwhile, may refuse to enter guilty pleas because they sincerely believe that the federal tax laws are unconstitutional. This is not a winning argument for them; almost twenty years ago, the United States Supreme Court held that a considered, fundamental disagreement with the constitutionality of these laws does not represent a valid defense to a charge of tax evasion.<sup>272</sup> Yet even with this guidance, a sizeable coterie of tax resisters remains unwilling to concede the point, and demand to take their cases to trial.<sup>273</sup> One exasperated federal judge catalogued some of the “tired arguments”<sup>274</sup> advanced by these defendants: “That the Sixteenth Amendment to the U.S. Constitution was improperly ratified and therefore never came into being; That wages are not income and therefore are not subject to federal income tax laws; That tax laws are unconstitutional; That filing a tax return violates the privilege against self incrimination under the Fifth Amendment to the U.S. Constitution; That Federal Reserve Notes do not constitute cash or income.”<sup>275</sup>

That defendants continue to press these arguments in court, notwithstanding their nonexistent odds of success, underscores how many parties

---

nature of reporting requirement implicated by section 7203’s felony provision). Somewhat like 18 U.S.C. § 924(j), this crime finds itself being dragged to trial by other crimes charged alongside it.

<sup>270</sup> The Federal Sentencing Guidelines tether the custodial terms for tax evasion to the amount of tax that was evaded. U.S. SENTENCING GUIDELINES MANUAL § 2T4.1 (2011). A tax loss of \$100,000, assuming a first offender with no aggravating circumstances, leads to a guidelines range of 21–27 months in custody; a tax loss of \$1,000,000, with the same assumptions, leads to a Guidelines range of 41–51 months in custody. *Id.*, Sentencing Table.

<sup>271</sup> Celebrities charged with tax-evasion over the past few years include Formula One race-car driver Helio Castroneves, *see* Indictment, United States v. Castroneves, No. 08-20916 (S.D. Fla. Oct. 2, 2008); and movie actor Wesley Snipes, *see* Indictment, United States v. Snipes, No. 5-06-cr-22(S1)-Oc-10GRJ (M.D. Fla. Oct. 12, 2006).

<sup>272</sup> *Cheek v. United States*, 498 U.S. 192, 204–06 (1991) (rejecting a defendant’s claim that a studied objection to the constitutionality of the federal tax laws represents a defense to tax evasion).

<sup>273</sup> *See Russell v. United States*, 339 Fed. Appx. 637, 638 (7th Cir. 2009) (citing many judicial opinions, including several in criminal cases, that rejected constitutional attacks on the tax laws); *United States v. Matthies*, 319 Fed. Appx. 554, 557 (9th Cir. 2009) (approving of the district court’s limitation on defendants’ proffered trial testimony regarding the constitutionality of the tax laws); *United States v. Swan*, 198 Fed. Appx. 21, 22 (1st Cir. 2006) (observing that the defendant, convicted after a jury trial, raised an argument concerning the constitutionality of the tax laws that was precluded by United States Supreme Court precedent).

<sup>274</sup> *United States v. Buckner*, 830 F.2d 102, 103 (7th Cir. 1987), quoting *Coleman v. CIR*, 791 F.2d 68, 70 (7th Cir. 1986).

<sup>275</sup> *Id.* at 103.



simply do not behave as extrapolation from likely trial outcomes might predict. To these defendants, principle or other inchoate interests may override more tangible matters, such as custody time, upon which most rational defendants are supposed to fixate.<sup>276</sup> This point is often lost, however, even on the most astute observers. For example, the passage in the paragraph above, which relates a series of predictably futile arguments that defendants may prefer over plea deals, was written by none other than Judge Frank Easterbrook.<sup>277</sup>

## V. CONCLUSION

The preceding discussion establishes that crime content and the relationships among criminal offenses can have significant effects upon plea-bargaining practices. This awareness offers a better understanding of the factors that encourage and stymie plea bargains, and sheds additional light on the limitations and nuances of the rational-actor model.

Data similar to that related above also could produce more thoughtful evaluations of new and existing crimes, and not just in connection with plea bargaining.<sup>278</sup> Today, the debates over most new crimes could charitably be described as banal. And once a crime has been enacted, there exists little to no ongoing consideration of how the offense is being utilized. As this article demonstrates, there already exists useful information regarding the invocation and application of specific crimes. One can discern with relative ease how often prosecutors charge a crime; the circumstances in which it has been charged; the plea bargains the crime has produced, and the sentences associated with those deals; the frequency with which a charge goes to trial; and the outcomes in these trials. In other words, one can tell how—and *how well*—a crime is working.

This information, appropriately harnessed, would facilitate and enhance the evaluation of new and existing crimes. For starters, the utilization of comparable offenses could help legislatures predict how a proposed crime will be deployed. On this point, consider a different market analogy. When a business considers whether to launch a new product line, it often will research how similar products have fared in the past. The business also will consider the costs and benefits associated with production, including how much the product will cost to

---

<sup>276</sup> See Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, *supra* note 63, at 2554 (observing that in criminal cases, “the defendant almost always prefers freedom to incarceration and less incarceration to more”).

<sup>277</sup> *Id.* at 104.

<sup>278</sup> In *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power*, *supra* note 19, Wright and Engen suggest another use for charge-level plea data: guides based on plea data that prosecutors and defense attorneys could use to gauge what a fair, or at least, conventional plea deal would entail. *Id.* at 1977–78.

produce and what return it will provide on invested capital. These steps are so common, and so taken for granted, that one would regard a business that failed to engage in this sort of benchmarking as likely headed for insolvency.

Legislative consideration of new crimes should be no different. Patterns of use for comparable existing crimes can help legislatures anticipate how proposed new offenses will be utilized, with these predictions permitting the improved appraisal of the costs and benefits associated with the suggested addition to the criminal code. This proposal is not wholly hypothetical. In 2011, Colorado enacted a law<sup>279</sup> that requires the pre-enactment screening of new crimes. Under this statute, these crimes are to be accompanied by a fiscal note that includes, among other information, (a) an analysis of whether the new crime already may be charged under current law; (b) a comparison of the proposed crime to similar offenses; and (c) “an analysis of the current and anticipated future prevalence of the behavior that the proposed new crime . . . intends to address.”<sup>280</sup> Though this measure stops short of calling for the comprehensive analysis of the usage of offenses similar to the new crime, it represents a step in this direction.

Furthermore, we know very little about the utilization of existing crimes—from 2 U.S.C. § 192 (Congressional contempt)<sup>281</sup> to 50A U.S.C. § 2410(b) (willful violation of war-material export regulations).<sup>282</sup> As matters stand, we lack answers to some very basic questions regarding specific federal criminal

---

<sup>279</sup> An Act Concerning a Requirement to Include Additional Information in Fiscal Notes for Certain Bills Related to Criminal Offenses, 2011 Colo. Sess. Laws 204.

<sup>280</sup> COLO. REV. STAT. § 2-2-322 (West 2011)

<sup>281</sup> “Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than \$1,000 nor less than \$100 and imprisonment in a common jail for not less than one month nor more than twelve months.” 2 U.S.C. § 192 (2006).

<sup>282</sup> Pursuant to 50A U.S.C. § 2410(b):

Whoever willfully violates or conspires to or attempts to violate any provision of this Act [sections 2401 to 2420 of the Appendix to Title 50 of the United States Code, which deal with export controls] or any regulation, order, or license issued thereunder, with knowledge that the exports involved will be used for the benefit of, or that the destination or intended destination of the goods or technology involved is, any controlled country or any country to which exports are controlled for foreign policy purposes—(A) except in the case of an individual, shall be fined not more than five times the value of the exports involved or \$1,000,000, whichever is greater; and (B) in the case of an individual, shall be fined not more than \$250,000, or imprisoned not more than 10 years, or both.

50A U.S.C. § 2410(b) (2006).

laws, such as: Which of the estimated 4,450 federal crimes are actually utilized, and which are effectively moribund? Which crimes have the highest and lowest conviction rates? Which crimes tend to be most difficult to prove, when put in front of judges and juries? What other trends or patterns, if any, emerge when one examines the invocation of particular crimes across judicial districts, and over time?

The answers to these questions matter, both to policymakers and practitioners. Today, assertions that the federal code contains “too many” crimes,<sup>283</sup> that prosecutors are coercing plea bargains through improper or overzealous charging practices,<sup>284</sup> and that other aspects of “overcriminalization” are undermining the rule of law<sup>285</sup> tend to rely on anecdotal evidence more than hard data regarding the utilization of particular offenses. It is therefore unsurprising that these assertions have failed to produce significant substantive reforms; even if legislators were inclined to revisit the criminal laws, they rarely would know precisely which crimes merit their attention. If, on the other hand, it was generally understood precisely *which* crimes lie fallow, *which* crimes seem to be used to coerce plea bargains, and *which* crimes are most difficult to prove, reformers would have a better sense as to where to target their energies.

And so, in the final analysis, this article argues that in at least one important way crimes should be treated *more* like widgets, or at least, like “normal” products. Just as corporations engage in market studies prior to product launch, they also periodically assess whether their existing products have generated substantial profits. The tendency to lump specific crimes into generic offense categories such as gun, drug and immigration offenses has made this sort of analysis difficult. But by appreciating the importance of the specific nature and utilization of each crime, we may put ourselves in a position to maximize the returns generated by the criminal law.

---

<sup>283</sup> “The academic consensus is that federal criminal law . . . includes too many offenses . . . and covers too many people within the scope of its sanctions. The criminal law of the states has also been charged with being bloated and rapacious, although there the consensus may be weaker.” Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491, 1497–98 (2008) (footnote omitted).

<sup>284</sup> Here, a distinction must be drawn between those commentators who allege that prosecutors frequently allege offenses that cannot be proved beyond a reasonable doubt, *e.g.*, ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 31 (2007) (“Prosecutors routinely engage in overcharging, a practice that involves ‘tacking on’ additional charges that they know they cannot prove beyond a reasonable doubt or that they can technically prove but are inconsistent with legislative intent or otherwise inappropriate.”), and those who claim that prosecutors often bring charges that, although supported by adequate facts, seem too severe in light of the surrounding circumstances, *e.g.*, Norman Abrams, *The New Ancillary Offenses*, 1 CRIM. L. F. 1, 25 (1989).

<sup>285</sup> See generally DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* (2008).